

JAN 29 1942

IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

No. 595

SWIFT AND COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ET AL.,

Appellees.

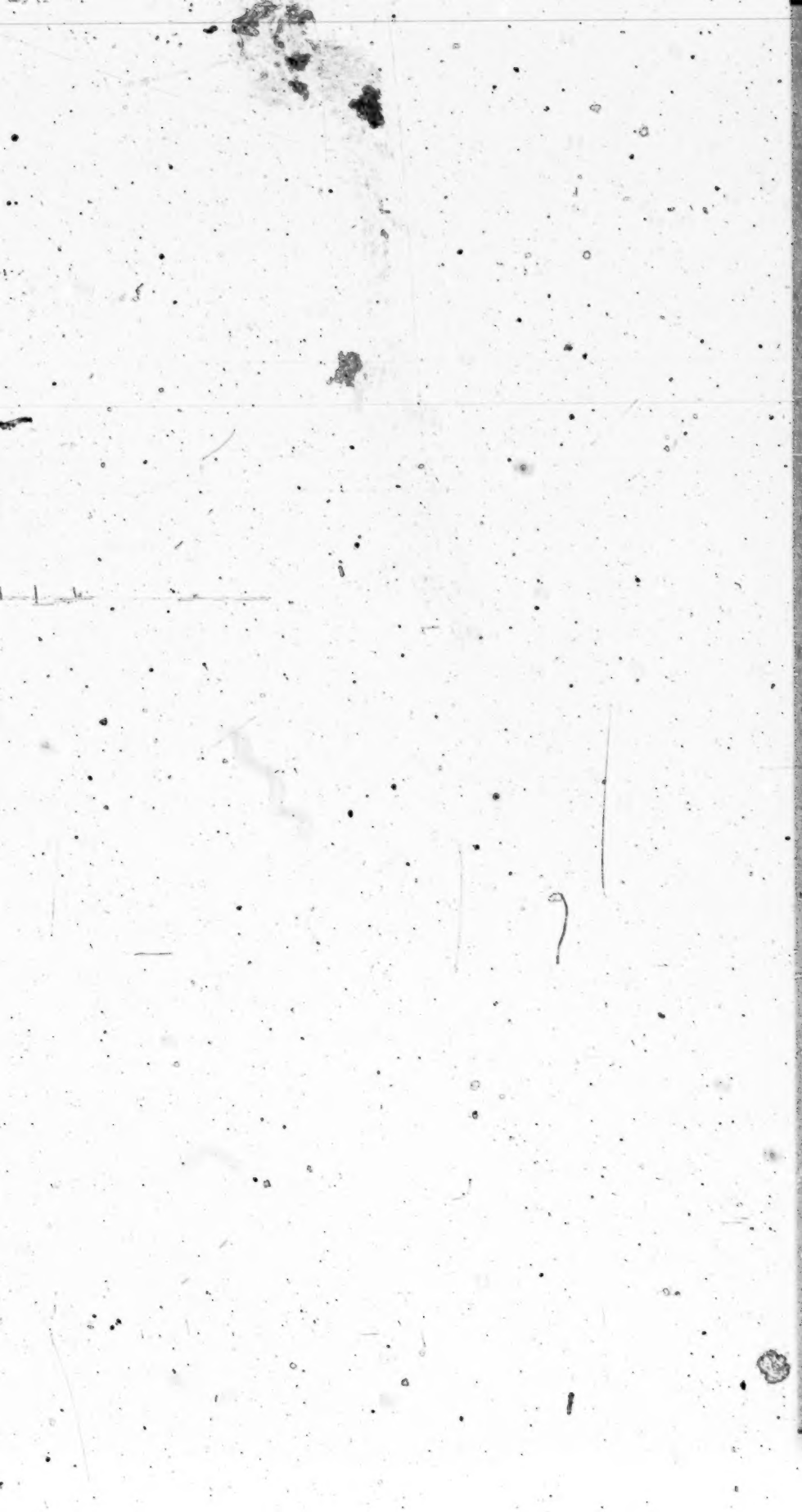
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

APPENDIX TO APPELLANTS' BRIEF

EDGAR B. KIXMILLER,
ROSS DEAN RYNDER,

Counsel for Appellants

January 21, 1942.



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(NOTE: In this appendix, the emphasis indicated by italics is supplied by counsel. The reference "R. p." refers to the page number of the printed record in this court. Where reference is made to exhibit numbers, the numbers are those given to the exhibits in the hearings before the Commission. These exhibits were certified to this court separately from the record and have not been printed on this appeal, except as certain portions thereof are to be found in this appendix.)

STATUTES CITED.

INTERSTATE COMMERCE ACT, PART I.

(U. S. C. A. Tit. 49, § 1).

SECTION 1, PARAGRAPHS (3) (a) AND (4).

"(3) (a) The term 'common carrier' as used in this part shall include all pipe-line companies; express

companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this part it shall be held to mean 'common carrier.' The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term 'person' as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof."

"(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and

to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

SECTION 6, PARAGRAPHS (1) AND (7).

“(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The pro-

visions of this section shall apply to all traffic, transportation, and facilities defined in this part."

"(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

SECTION 9.

"Sec. 9 (*As amended August 9, 1935.*) (*U. S. Code, title 49, sec. 9.*) That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such

corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

SECTION 15, PARAGRAPH (5).

"(5) Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards."

PACKERS AND STOCKYARDS ACT, 1921.

(U. S. C. A. Tit. 7, § 201(b)):

"(b) The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock."

(U. S. C. A. Tit. 7, § 226)

"Sec. 406 (a) Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce

Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission."

JUDICIAL CODE AND JUDICIARY.

(U. S. C. A. Tit. 28).

SECTION 41, SUBSECTION (27).

"§ 41, subd. (27) *Enforcement of orders of Interstate Commerce Commission.* Twenty-seventh. Of all cases for the enforcement of any order of the Interstate Commerce Commission."

SECTION 41, SUBSECTION (28).

"§ 41, subd. (28) *Setting aside order of Interstate Commerce Commission.* Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

SECTION 43.

"§ 43. *Venue of suits relating to orders of Interstate Commerce Commission.* The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be

construed as meaning final destination of such shipment."

SECTION 44.

"§ 44. *Procedure in certain cases under interstate commerce laws; service of processes of court.* The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43 and 49 of Title 49, run, be served, and be returnable anywhere in the United States."

SECTION 45.

"§ 45. (Judicial Code, section 209.) *District courts; practice and procedure in certain cases.* The jurisdiction of the district courts of the cases specified in section 44 of this title, and of the cases and proceedings under sections 20, 43 and 49 of title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of

the court or a judge thereof, an answer to the petition shall be filed in the clerk's office and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court."

SECTION 45a.

"§ 45a. (Judicial Code, sections 212, 213, amended.) *Special attorneys; participation by Interstate Commerce Commission; intervention.* The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43 and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto

of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein.

“Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.”

SECTION 46.

“§ 46. (Judicial Code, section 208.) *Suits to enjoin orders of Interstate Commerce Commission to be against United States.* Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's

order pending the final hearing and determination of the suit."

SECTION 47.

"§ 47. *Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court.* No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or

suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction; in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply."

SECTION 47a.

"§ 47a. (Judicial Code, section 210.) *Appeal to Supreme Court from final decree; time for taking; priority.* A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice

of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, § 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)"

SECTION 48.

"§ 48. (Judicial Code, section 211.) *Suits to be against United States; intervention by United States.* All cases and proceedings brought under subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49 shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved."

DECISION OF INTERSTATE COMMERCE COMMISSION IN ALLIED
PACKERS v. ATCHISON, T. & S. F. RY. CO., 161 I. C. C. 641.

INTERSTATE COMMERCE COMMISSION.

No. 18490.

Allied Packers, Incorporated, *et al.* v. Atchison, Topeka &
Santa Fe Railway Company, *et al.*

Submitted February 13, 1929. Decided March 10, 1930.

Upon reargument finding in former report, 144 I. C. C. 377,
that certain charges for handling livestock at Buffalo
stockyards, Buffalo, N. Y., were not subject to the juris-
diction of the commission, reversed. Such charges found
illegal and unreasonable. Reparation awarded.
Appearances same as in former report.

REPORT OF THE COMMISSION ON REARGUMENT.

ATCHISON, *Commissioner*:

In the former report herein, 144 I. C. C. 377, division 2
found that certain charges collected from complainants for
handling their livestock at the Buffalo stockyards, Buffalo,
N. Y., were not subject to the jurisdiction of the commis-
sion, and dismissed the complaint. Upon petition of com-
plainants, the case was reopened and reargument had.

Complainants, the Allied Packers, Incorporated, and its
subsidiary, the Klinek Packing Company, Incorporated,
operate a packing house at Buffalo. They allege that the
unloading charges collected at the Buffalo stockyards, here-
inafter referred to as the stockyards, on numerous car-
loads of livestock, principally hogs, from several interstate
points to Buffalo were unreasonable and inapplicable. The
freight rates on the livestock from points of origin to
Buffalo are not in issue. Reparation is asked.

The stockyards are at East Buffalo, N. Y., and are owned and operated by the New York Central. They are not a legal corporate entity. They consist of 96 unloading chutes and several pens for storing livestock, and are connected by an overhead enclosed runway with complainants' plant. The unloading of the stock from the cars into the chutes, thence to the storage pens when necessary, is performed by the stockyard employees, who are also employees of the New York Central. Until December, 1919, the date the Klinck Packing Company was purchased by the Allied Packers, Incorporated, the former purchased most of its livestock in the stockyards, and, to facilitate the handling of the stock, the overhead runway referred to was built by the New York Central across its tracks, and the public street between the stockyards and complainants' property, with the understanding that the Klinck Packing Company would buy a large portion of its livestock in the stockyards market. Upon the acquisition of the Klinck Packing Company by the Allied Packers Incorporated, the latter immediately began to receive large quantities of livestock from outside points and purchased only a small portion of its requirements in the stockyards. These direct consignments of livestock were delivered through the stockyards at the freight rates from points of origin to Buffalo. The handling of such shipments interfered with the handling of livestock consigned for sale at the stockyards market, and resulted in the stockyards' employees rendering service in handling livestock not consigned to that market but directly consigned to complainants at Buffalo. Under these circumstances two free unloading chutes were constructed by the New York Central at the stockyards and the charges assailed were published and filed with the Department of Agriculture effective December 3, 1922. Subsequent to that date such charges in addition to the freight rates were collected on complainants' shipments handled through the stockyards in the usual manner. Com-

plainants objected to the assessment of the charges and paid them under protest. This situation continued until January, 1925, when complainants built unloading chutes on their own property where they have since been receiving direct consignments of livestock. The complaint herein was originally received April 24, 1926.

The tariff naming the charges assailed is published in purported compliance with the packers and stockyards act, 1921, in accordance with instructions given by the Secretary of Agriculture. It is not on file with this commission. A copy of this tariff was furnished complainants early in 1923. The section publishing the charges assailed reads as follows:

The following charges will be collected for each 24-hour period or fraction thereof that the stock remains in the Buffalo Stock Yards on all livestock not weighed or offered for sale which is unloaded, stored or delivered to consignees, or delivered from outside the stockyards to loading chutes for loading out.

Cattle	10 cents
Calves	5 cents
Hogs	3 cents
Sheep or goats	2 cents
Horses	10 cents

In finding that this commission is without jurisdiction of the charges assailed, division 2 based its conclusion on four main grounds: (1) That after defendants had provided free unloading facilities for direct consignments complainants could not demand as a matter of legal right that they be accorded delivery through the stockyards with the extra accommodation without paying for the extra service; (2) that under the method of delivery employed defendants were rendering a service in excess of their legal obligation and that the elimination of that service did not curtail the service of transportation but connected delivery with unloading without any intervening service; (3) that section 15 (5) required defendants to unload complainants' ship,

ments into suitable pens, but not to drive them through the chutes and overhead runway to complainants' plant, without additional compensation; and (4) that the transportation ended when the stock was unloaded into the chutes or storage pens and that thereafter it was subject to the provisions of the packers and stockyards act, 1921.

Under section 1 (1), the interstate commerce act applies to common carriers engaged in the transportation of passengers or property by railroad. Paragraph (3) of the same section defines the term "railroad" as including all terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" is defined as including all instrumentalities and facilities of shipment or carriage and all services in connection with the receipt, delivery, storage, and handling of property transported.

The shipments here considered were unloaded from the cars into the unloading chutes by the stockyards employees, who were also employees of the New York Central. In some instances delivery was immediately taken by complainants' employees who drove the stock through the yards across the overhead runway to complainants' plant. In other instances the stock was removed by the stockyards employees to storage pens, and from there driven by complainants' employees to the plant.

No charge was made for unloading the stock into the unloading chutes. It is admitted by defendants that this service, which is performed by the stockyards' employees, is subject to our jurisdiction. Clearly this is so.

The charges assailed, labeled storage charges, cover the service of furnishing the chutes, pens, driveways, and runways necessary to receive the stock at the unloading point and take it from that point out of the stockyards. They

were assessed even when complainants' employees were waiting and ready to receive the stock at the time of its arrival and unloading from the cars, and when the unloading and driving of the stock through the stockyards was, as far as practicable, one continuous movement and transaction.

The undertaking of the carrier to transport goods necessarily includes the duty of delivering them to the consignee entitled to their possession. *North Penn. Railroad v. Commercial B'k.*, 123 U. S. 727. A carrier does not fulfill this obligation to deliver by merely providing a place where goods may be taken out of a car, but it must also provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property. *Covington Stock Yards v. Keith*, 139 U. S. 128; *Norfolk Ry. v. Public Service Commission*, 265 U. S. 70. This service inheres in every transportation.

With the foregoing statements of the carrier's duties in mind, the conclusion seems inevitable that the stockyards when used to perform the service described were terminal facilities used in the transportation of property, and were freight depots, yards, or grounds used in the delivery of such property, and that the service described is clearly a service in connection with the receipt, delivery, storage, and handling of property transported.

The building of the so-called free-delivery chutes prior to the assessment of the charges assailed has had no effect upon the method of handling livestock at the stockyards. As far as this record indicates the free chutes have never been used either by complainants or any other shipper. For years prior to December 3, 1922, the stockyards were clearly a terminal facility of the New York Central furnished under that carrier's duty to provide suitable means for receiving livestock offered to it for shipment and for discharging livestock after it reaches the place to which it

is consigned. These facilities were furnished the Klinck Packing Company for years, and the Allied Packers, Incorporated, made similar use of them since its purchase of the plant in 1919: By custom or practice a place of delivery other than a regular station may become a station at which the full responsibility of a carrier attaches. *Charnock v. Texas & Pacific Ry. Co.*, 194 U. S. 432. *A fortiori* a carrier can not change into a special facility what has become by custom its regular station facility by merely going through the form of establishing its regular station at another point. The mere assessment of a charge for the use of the stockyard facilities can not operate to deprive us of jurisdiction. No change whatever was made in the tariffs on file with us. There is ample support in the record for the finding that the stockyards had been for years and were during the period covered by this complaint terminal facilities of the New York Central when used to effect delivery of direct consignments of livestock.

With respect to the claim of defendants that notice was given to complainants of the availability of the free-delivery chutes, the record is in hopeless conflict. Defendants do not claim to have given written notice, and the evidence respecting the alleged oral notice is far from convincing. Nor can it be said that defendants have established the adequacy of the free-delivery chutes, in the face of the showing of complainants that such chutes could not have accommodated the volume of complainants' business and that deliveries there would, at least at times, have been impracticable.

Complainants point out that section 15 (5) applies to shipments destined to or received at public stockyards, and expressly provides that its terms shall not be construed to affect the duty of carriers of performing service as to shipments other than those to or from public stockyards. They therefore contend that, inasmuch as the shipments under consideration were consigned not to the stockyards but to

complainants' plant, the provisions of that paragraph have no application. We are not prepared to accept such a restricted interpretation of the paragraph in question.

The previous report cites with approval *Southwestern Horse & Mule Asso. v. A., T. & S. F. Ry. Co.*, 129 I. C. C. 730. In that case division 1 considered the question of the jurisdiction of this commission over yardage charges on shipments of horses, mules, burros, and asses, delivered to dealers through the public stockyards in North Fort Worth, Tex. In several particulars the situation there differed materially from that here presented. The line-haul carriers there did not directly serve the stockyards but shipments were handled to and from the stockyards by a belt railway. The belt railway was not a defendant in that case. The stockyards company at North Fort Worth was a separate corporate entity, totally independent of the trunk lines. The line-haul carriers had adequate and accessible facilities regularly established where delivery of the shipments could have been made without a charge for yardage.

In finding the yardage charges not subject to our jurisdiction the report in the case cited relies to some extent on the provisions of section 15 (5), which reads as follows:

Transportation wholly by railroad of ordinary live-stock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the

transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

In discussing the effect of the enactment of this paragraph the report in that case states, at page 737:

The amendment defines transportation as including "delivery . . . into suitable pens," and under the rules of statutory construction must be given effect over the general definition contained in section 1 in the case of carload shipments of ordinary livestock destined to public stockyards. Complainants admit that the unloading pens considered are suitable pens within the meaning of the amendment. The question therefore is whether section 15, paragraph (5), is complied with by delivery of the livestock into such pens.

A careful reading of the amendment to section 15 in the light of prior and subsequent decisions dealing with questions closely related to that here presented leads to the conclusion that transportation of ordinary livestock, in carloads, to public stockyards ends when the animals are unloaded into suitable pens at such yards. It follows that this marks also the limit of our jurisdiction over such shipments.

The enactment of the paragraph in question is traceable to our decision in *Live Stock Loading and Unloading Charges*; 52 I. C. C. 209, wherein we upheld the carriers in their refusal to absorb on shipments of livestock the increases in loading and unloading charges of the public stockyards at Chicago. The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges to the line-haul charges on shipments of livestock to and from public stockyards. The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1, or to restrict our jurisdiction. The sense of the

paragraph is that the services named shall be performed at the carriers' expense without additional charge to the shipper.

The specific enactment takes precedence over the general enactment only where there is conflict between the two; in the absence of conflict both must be given effect. A specific provision that with respect to certain shipments certain services shall be included within the term transportation is not in conflict with a general provision which merely includes in the same term a great variety of services with respect to all classes of shipments. If a particular service is included in the general definition, the failure to include the same service in a specific provision covering certain shipments does not indicate an intention to exclude such services. The paragraph in question contains no words indicating an intention to repeal or modify section 1 (3), and repeals by implication will not be indulged if there is any other reasonable construction.

25. *Ruling Case Law*, page 918.

The primary purpose of the packers and stockyards act, 1921, is to regulate the operations of packers, commission merchants, and stockyard owners in connection with the handling of livestock consigned for sale at primary markets, *Stafford v. Wallace*, 258 U. S. 495, 514. That act expressly states that its provisions shall not affect the power or jurisdiction of this commission, nor confer upon the Secretary of Agriculture concurrent power or jurisdiction over any matter within our power or jurisdiction. In considering the question of our jurisdiction over certain service charges collected on shipments of livestock stopped en route for food, water, and rest, we stated in *Strauss & Adler v. New York C. R. Co.*, 153 I. C. C. 609, at page 618:

Bearing in mind that the two acts should be construed in a manner not to create a conflict or overlapping of jurisdictions of the two Federal agencies

entrusted with their enforcement, and recognizing that any doubt which may exist is by the above provision to be resolved in favor of the authority delegated in the older of the two statutes, we can see nothing in the provisions of the packers and stockyards act, 1921, which in any way limits or affects the jurisdiction of this commission previously conferred to regulate "all charges . . . for any service rendered or to be rendered in the transportation of passengers or property."

We find that the charges herein assailed in so far as they were assessed for the use of the stockyards facilities in effecting delivery of interstate shipments were charges for transportation within the meaning of that term as defined in section 1 of the interstate commerce act, and that we have jurisdiction to pass upon the legality and reasonableness of such charges. We further find that the collection of such charges without tariff authority was in violation of section 6 of the interstate commerce act.

In cases where a service is performed for which no charge is properly published we have jurisdiction to determine a reasonable charge for such service. *Memphis Freight Bureau v. K. C. S. Ry. Co.*, 17 I. C. C. 90. But defendants have not, on this record, justified any charge in addition to the line-haul rates.

We accordingly find that the charges assailed are illegal and unreasonable. We further find that the shipments were made as described; that complainant, Allied Packers, Incorporated, paid and bore the charges thereon; that it was damaged thereby in the amount of the charges herein found illegal and unreasonable, and that it is entitled to reparation, with interest. That complainant should comply with Rule V of the Rules of Practice. The original complaint was received April 24, 1926, and covered only shipments delivery of which was taken at the unloading chutes immediately after unloading from the

cars. By amendment filed November 4, 1926, shipments as to which delivery was not immediately taken were added. It follows therefore that claims for reparation are barred where delivery took place prior to April 25, 1923, as to the first class of shipments, and prior to November 5, 1923, as to the second class. The parties should be careful to avoid the inclusion of barred shipments in the Rule V statement.

BRAINERD, *Commissioner*, concurring:

I understand that the majority are of the opinion that the line-haul rates charged included the delivery service here considered and that the additional charges assessed for that service were to the extent of such charges different and greater than the compensation provided by tariff and therefore illegal.

The majority include in their findings a determination that the rates charged were unreasonable but in my opinion there is no evidence on which to predicate such a finding. It is sufficient that the rates charged were in excess of those named in the tariffs published in accordance with the interstate commerce act. The additional charges exacted were technically overcharges and reparation therefore is in my opinion properly awarded.

CHAIRMAN McMANAMY and COMMISSIONERS WOODLOCK and PORTER dissent. COMMISSIONERS LEE and TATE did not participate in the disposition of this case.

DECISION OF INTERSTATE COMMERCE COMMISSION IN HYGRADE FOOD PRODUCTS CORP. v. ATCHISON, T. & S.F. RY. CO., 195 I. C. C. 553. (ORDER VACATED IN ATCHISON, T. & S. F. R. CO. v. UNITED STATES, 295 U. S. 193, 79 L. ed. 1382.)

INTERSTATE COMMERCE COMMISSION.

No. 24375.

Hygrade Food Products Corporation vs. Atchison, Topeka & Santa Fe Railway Company *et al.*

Submitted January 25, 1933. Decided July 25, 1933.

1. Livestock, in carloads, consigned to complainant at the Union Stock Yards, Chicago, Ill., found not subject to yardage charges in instances where delivery was or is taken at the unloading pchs. Reparation awarded.
2. Switching charge applicable to the placement for delivery of carloads of livestock at complainant's plant at Chicago not shown to be unreasonable or otherwise unlawful.

Cyril J. Curran for complainant.

J. N. Davis, D. P. Connell, P. F. Gault, Walter McFarland, E. Rigg, R. G. Raasch, Frank H. Towner, and Luther M. Welter for defendants.

Paul E. Blanchard, Ross Dean Rynder, and William N. Strack for interveners.

REPORT OF THE COMMISSION.

BY THE COMMISSION:

Exceptions were filed by complainant and defendants to the report proposed by the examiner, and the case was orally argued. Our conclusions differ somewhat from those recommended by him.

Complainant, a corporation, has a packing house on the rails of the Chicago Junction Railway near the public stockyards known as the Union Stock Yards at Chicago, Ill. By complaint filed March 19, 1931, as amended, it is alleged that for the delivery of carloads of livestock at these public yards certain yardage charges assessed in addition to the rates named in tariffs on file with us were and are inapplicable, that the imposition of these charges was and is unreasonable, that switching charges demanded for the placement of carloads of livestock at complainant's plant are inapplicable and if applicable are unreasonable, and that these charges were and are unjustly discriminatory, unduly prejudicial to complainant, and unduly preferential of the Omaha Packing Company, in Chicago, a competitor of complainant. Reparation and a lawful adjustment for the future are sought. The Omaha Packing Company intervened. Armour and Company intervened in support of the complaint. The term livestock as used herein embraces only animals intended for slaughter, such as cattle, hogs, and sheep.

Complainant's plant lies directly north of the unloading pens of the Union Stock Yards which are operated by the Union Stock Yard & Trans. Company. There is a connecting subway under a public highway through which livestock are driven from the yards to the plant. Complainant's plant is served only by the rails of the Chicago Junction. No livestock have ever moved by rail to or from the sidings at complainant's plant or to or from rails adjacent thereto. In addition to certain sidings used and needed for other freight, and which complainant does not suggest or offer for the receipt of livestock, there are two stub tracks near the western boundary of complainant's plant, now used for car storage, which were constructed about the year 1924. The capacity of each of these stubs is 10 or 12 cars. Complainant proposes the use of one of these stubs for the receipt of livestock.

There are now no facilities there for the unloading of livestock and no scales for weighing. Complainant contends that the charges of \$2.70 and \$1.35 per carload of livestock from the West and East, respectively, applicable to deliveries to "industries, chutes or sidings of the Union Stock Yard & Transit Company, at Union Stock Yards" apply to deliveries at its plant. This contention is without merit. The published switching charge applicable to the placement at complainant's plant of a carload of livestock is \$12.

No sidetrack delivery of livestock to any packing house or other industry is made by the Chicago Junction. The Union Stock Yards are public yards served over the rails of the Chicago Junction by the individual line-haul carriers bringing livestock to Chicago, and they are the livestock terminal at Chicago of all of these carriers. They provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make.

The Omaha Packing Company is an industry local to the rails of the Chicago, Burlington & Quincy Railroad Company, hereinafter called the Burlington. This industry receives no shipments and buys no livestock through or at the Union Stock Yards. All livestock received by it by rail are placed by the Burlington and the actual unloading into pens and the hoof weighing of the animals is assumed by the industry itself. It is a subsidiary of Swift & Company. Swift & Company, the complainant, and all dealers in livestock in Chicago, other than the Omaha Packing Company, receive direct or buy after receipt by others all inbound livestock at the Union Stock Yards.

Within the switching limits of Chicago, in addition to the facilities of the Union Stock Yards, certain of the line-haul carriers maintain facilities for unloading livestock, the use of which by complainant is impractical. No carrier other than the Burlington delivers or places car-

load shipments of livestock at any private industry. Defendants have refused to provide for the delivery of livestock at complainant's plant at the rates and charges which apply on livestock delivered at the Union Stock Yards, or at the plant of the Omaha Packing Company.

Defendants urge that, if plant delivery of livestock were made for this complainant, all other packing industries similarly situated on the Chicago Junction Railway would be entitled to like services and that if such services were attempted to be rendered generally, confusion and delay would result. While deliveries are made at the plant of the Omaha Packing Company without the assessment of a switching charge such as applies to deliveries at complainant's plant, there is no indication that transportation services, conditions, and circumstances connected with deliveries at complainant's plant would be substantially similar to those connected with deliveries at the plant of the Omaha Packing Company, and no facts of record lead to the conclusion that charges applicable to such services as may be performed in making deliveries at complainant's plant are unreasonable or that the differences in these charges are not warranted.

Yardage charges per animal are assessed on all shipments of livestock delivered at the Union Stock Yards, and have been assessed since the establishment of the yards. They now are per head of cattle 35 cents, calves 25 cents, hogs 12 cents, and sheep 8 cents, and these are the charges whether or not the animals are weighed. A schedule naming these charges is filed with the Department of Agriculture in purported compliance with the Packers and Stockyards Act, 1921, but has not been filed with us. Complainant contends that these charges are for transportation services and may not be assessed. The fact that certain services come within the term transportation as defined in section 1 of the Interstate Commerce Act, and the fact that

charges assessed for such services are not in any schedule on file with us are not of themselves sufficient reasons why no charges may be made therefor. *Memphis Freight Bureau v. K. C. S. Ry. Co.*, 77 I. C. C. 90. Complainant does not allege that the yardage charges in issue are unreasonable if they may be lawfully applied, and relies upon section 15, paragraph (5), of the act, which provides that:

Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, . . .

Under this provision of the act which applies to interstate transportation by rail of ordinary livestock to all public stockyards, including the Union Stock Yards, no extra charge may be made for any portion of the necessary service of delivery into suitable pens, and consignees are entitled to delivery at pens suitable for proper delivery without charge for the mere placement therein of the livestock. The fact that the line-haul carriers have other places of delivery at Chicago, where no extra charge is made, is not a legally sufficient reason, as contended by these carriers, for an extra charge at the Union Stock Yards. In *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, decided March 2, 1891, the Supreme Court of the United States said:

So, when livestock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport and deliver livestock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and

such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee.

The same principle necessarily applies to the receiving of livestock by the carrier for transportation. The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported as well as to the necessities of the respective localities in which it is received and delivered. A carrier of livestock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

In respect to the mere loading and unloading of live stock, it is only required by the nature of its employment to furnish such facilities as are reasonably sufficient for the business at that city. So far as the record discloses, the yards maintained by the appellants are, for the purposes just stated, equal to all the needs, at that city, of shippers and consignees of live stock; and if the appellees had been permitted to use them, with-

out extra charge for mere "yardage," they would have been without just ground of complaint in that regard; for it did not concern them whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish.

A charge for the yardage of livestock after consignee has not taken advantage of any reasonable opportunity afforded to obtain prompt delivery is not a violation of any provision of the Interstate Commerce Act. What constitutes a reasonable opportunity may be determined from the circumstances at the particular yards concerned. At the Chicago Stock Yards 14,000,000 animals were unloaded in 1930. Those yards are the greatest livestock terminal and market in the world. The magnitude of the business done there demands a degree of promptitude in the receipt and removal of animals that is not generally essential. It is indicated that the method of handling livestock at these yards is efficient and generally productive of satisfactory results. Livestock is moved over the rails of the Chicago Junction to the unloading platforms of the Union Stock Yards by the line-haul crews. These platforms are provided with chutes or inclines connecting them with unloading pens which have capacities sufficient to hold any carload of livestock. The unloading is done by Stock Yards employees at the expense of the rail carriers and the average time of unloading is about 2 minutes to a carload. These unloading pens are not adapted for the prolonged holding of animals, or for their feeding, watering, and special care; from them the animals must be removed promptly, and if delivery is not then taken by the consignees the animals are placed in holding pens where they may receive the attention required. At the peak of receipts, livestock are removed from the unloading pens at frequent intervals measured in minutes, whereas, toward the last of the de-

liveries for the day, livestock may remain in the unloading pens for longer periods. Prompt handling is accomplished by the use of two groups of unloading pens. While one trainload of unloaded livestock is being removed from one group, another trainload is placed for unloading into another group. The first group then becomes available for the unloading of a third trainload.

As to about 15 percent of all shipments consigned to complainant it has taken delivery before the animals were placed in holding pens, and in such instances has driven them from the unloading pens over scales and across and through the ways provided by the stockyards company to complainant's pens and plant. It is asserted that such delivery can be taken as to over 90 percent of the shipments and it is not indicated that notice for that purpose is necessary. It does not appear that there is any occasion for placing the animals into holding pens if prompt delivery is desired. There cannot be reasonable doubt that the unloading chutes and pens are suitable for the receipt of livestock, and the accomplishment of proper delivery to complainant. Complainant asserts that free delivery immediately upon arrival of livestock would be satisfactory but maintains that it is entitled also to free delivery at holding pens.

The fact that other freight is subject to storage or demurrage charges only after a lapse of considerable time is not a sufficient reason why a similar rule should apply in respect of yardage charges on livestock. After unloading, livestock requires unusual attention and care such as is not required by other freight.

Defendants point out that the assessment of yardage charges is the established practice at stockyards throughout the United States and has been the practice of the Chicago yards over 60 years. They argue that the purpose of section 15, paragraph 5, of the act was merely to provide

for the unloading of animals without extra charge. It is here demonstrated that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens. It appears that at some of the stockyards such delivery may be obtained without extra charge.

While we found in *Strauss & Adler v. New York Central R. Co.*, 188 I. C. C. 487, that under the provisions of section 15, paragraph (5), of the act and the 28-hour law, unloading en route is required "into properly equipped pens for rest, feed and water" without extra charge, prompt delivery of livestock to complainant at the Union Stock Yards does not require pens so equipped. If placement into such pens is desired, an extra charge therefor is not within the inhibition of section 15 that an extra charge may not be assessed.

We find that the assailed switching charge on carloads of livestock placed for delivery at complainant's plant is not shown to be unreasonable or otherwise unlawful.

We further find that livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens.

We further find that complainant paid charges found inapplicable, was damaged thereby in the amount paid, and is entitled to reparation in that amount with interest. Complainant should comply with rule V of the Rules of Practice.

EASTMAN, *Commissioner*, concurring in part:

With one exception, I concur in this report as far as it goes, but I do not believe that it goes far enough. My general position in regard to this matter was indicated in my dissenting expression in *E. Kahn's Sons Co. v. Baltimore & O. R. Co.*, 192 I. C. C. 705, 710-711. It does not seem to me that the unloading pens in this instance permit of reasonable opportunity to accept delivery and remove the

livestock from the premises after notice of arrival, and hence that they are not in all respects "suitable" for delivery within the meaning of section 15 (5) of the Interstate Commerce Act.

The exception referred to above is that I do not believe that the doctrine is sound which was enunciated in *Memphis Freight Bureau v. K. C. S. Ry. Co.*, 17 I. C. C. 90.

LEE, *Commissioner*, dissenting in part:

With that portion of the finding which deals with the assailed switching charge I am in accord, but I disagree with the conclusion of the majority to the effect that the yardage charges here assailed were inapplicable in instances where delivery was taken at the unloading pens. Shipments consigned to complainant at Union Stockyards are unloaded at the carrier's expense directly into unloading pens which are owned and maintained by the stockyards company. As stated by the majority there can be no reasonable doubt that these pens are suitable for the receipt of livestock and the accomplishment of proper delivery. Section 15 (5) of the Interstate Commerce Act provides, among other things that transportation of ordinary livestock destined to public stockyards shall include delivery into suitable pens without extra charge. As indicated the carriers bear the expense of unloading into these pens and delivery into suitable pens is, therefore, accomplished without extra charge. There is no provision in the act which required the carriers to do more. I am of the opinion, therefore, that we have no jurisdiction over the imposition of yardage charges on livestock after it has been delivered into the unloading pens at public stockyards. We have so held in two cases. See *Southwestern Horse & Mule Asso. v. A., T. & S. F. Ry. Co.*, 129 I. C. C. 730; *E. Kahn's Sons Co. v. Baltimore & O. R. Co.*, 192 I. C. C. 705. It is true that in the latter case, decided as recently as April 10, 1933, by the entire Commission, con-

signees could remove their livestock from the stockyards without the payment of any charges other than the line-haul rates. Nevertheless the majority found that transportation of ordinary livestock, in carloads, to public stockyards ended when the animals were unloaded into suitable pens at such yards and that this marked the limit of our jurisdiction. The suitable pens were the unloading pens. Since we have no jurisdiction beyond the unloading point we have no concern with what occurs thereafter.

Consideration of the provisions of the Packers and Stockyards Act, 1921, strengthens the foregoing view. Under that act the Secretary of Agriculture is given jurisdiction over stockyard services at public stockyards, which services are defined as follows:

The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock.

When reporting to the House of Representatives the bill which later became the act referred to the chairman of the Committee on Agriculture said, in part:

This bill proposes to give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith, . . . that is, the Secretary shall have jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction over the shipment . . . Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends: . . .

This leaves no doubt as to the intention of Congress to avoid conflicting or overlapping jurisdiction on the part

of several Government agencies. But let us analyze the result under the majority findings as I understand them. As to livestock which is unloaded into the unloading pens and later placed in the so-called hold pens until such time as complainant is ready to remove them, our jurisdiction extends only up to the time the animals have been unloaded, and the Secretary of Agriculture has jurisdiction beyond that point, but where complainant is at the unloading pen and removes the animals direct therefrom, this Commission steps in and continues beyond the unloading pen, into the realm of jurisdiction expressly given by the statute to the Secretary of Agriculture. Clearly it was not the intent of Congress to bring about such a situation. In this connection it is worthy of mention that an investigation instituted by the Secretary of Agriculture, and still pending, includes within its scope all of the services performed and charges made by the stockyards company, except the loading and unloading services and charges.

In purported compliance with the Packers and Stockyards Act a schedule of the yardage charges here complained of is on file with the Department of Agriculture, but it has not been filed with us. These charges are collected and retained by the stockyards company, and no portion of such charges is received by the rail carriers, either directly or indirectly. All of the foregoing lends support to the view that although the stockyards company is the agent of the carriers for the purpose of unloading the livestock, at the time the livestock is unloaded into suitable pens, our jurisdiction ends. Why, then, should the carriers be compelled to pay as reparation awarded by us, money which they never received.

The stockyards company began operation in February 1865, and during the past 50 years no trunk-line railroad company has had any ownership interest in the company or any control over its affairs. At the present time no

company engaged in the operation of a railroad has any interest in the stockyards company. During the time this company has been in operation its business has grown to enormous proportions. Its present facilities enable it to set 350 cars of livestock for unloading at one time. The time required for unloading a car is approximately 2 minutes and the process of unloading is practically continuous. In the year 1930 the stockyards company unloaded 240,501 cars containing more than 14,000,000 animals and loaded out 48,501 cars. This brings me to another point which in my opinion merits consideration, namely, that Congress by the enactment of section 15 (5) in view of the tremendous volume of livestock moving through public stockyards, of which it must be presumed to have had knowledge, recognized that transportation to and from such yards had to be treated differently than ordinary freight. Manifestly, to permit every consignee to enter the stockyards and remove his shipment direct from the unloading pens would result in endless confusion, and seriously interfere with the successful operation of the stockyards. This principle was recognized by the Commission in connection with the unloading of livestock at Chicago as evidenced by the following language used by the Supreme Court in *Adams v. Mills*, 286 U. S. 397:

The commission found that in view of the congested conditions in the Chicago stockyards and the great volume of traffic it would have been physically impracticable, if not impossible, for the consignee themselves to unload their own shipments.

Does not the same impracticability and impossibility apply in connection with the consignees taking their livestock direct from the unloading pens?

The assessment of yardage charges has been the practice at these stockyards for over 60 years. Certain of the line-haul carriers maintain facilities for unloading live-

stock at points within the switching limits of Chicago other than the Union Stock Yards. At such points delivery can be taken without the payment of yardage charges. The magnitude of the business done at the Union Stock Yards indicates that shippers prefer to take delivery there even though such delivery necessitates the payment of a yardage charge. In this preference shippers are doubtless influenced by the superior services available at these yards and the advantages accruing from their proximity to the public markets. Among the many facilities furnished by the stockyards company is an elevated driveway through which complainant's livestock may be and is driven directly to its plant, which is separated from the stockyards by a public street. It is for the use of this and other facilities of the stockyards company that the charges complained of are assessed. In effect the majority conclude that these facilities and the elevated driveway must be furnished by the carriers as a part of the "transportation" which they are required to furnish, which term is defined in section 1 (3) as follows:

The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels and all instrumentalities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

The majority say in effect that section 15 (5) in no wise modified section 1 (3). In my opinion the specific provisions contained in section 15 (5) must be given effect over the general provisions contained in section 1 (3). Support for this view is found in the concluding sentence of section 15 (5) reading as follows:

Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now ex-

isting by virtue of law respecting the transportation of other than ordinary livestock, *or the duty of performing service as to shipments other than those to or from public stockyards.*

The italicized portion clearly indicates an intention on the part of Congress to modify, and in my opinion it did modify, the services required of the carriers insofar as the duty of performing service on shipments of ordinary livestock to or from public stockyards was concerned. If this was not the case, manifestly the proviso in question is meaningless. Furthermore, since the term "transportation" in section 1 (3) includes storage, would not the carriers be required (if the majority view is sound) to hold livestock, where complainant was not at the unloading pens, in the so-called hold pens as a part of the transportation service until complainant was ready to receive the same? But the majority holds, and correctly so, that the holding of livestock in such hold pens is not a service of transportation.

As indicated, the line-haul carriers collected nothing in excess of the lawful tariff charges for the service they performed. Transportation over which we have jurisdiction ends when the livestock is unloaded into suitable pens. Admittedly the unloading pens are suitable pens. If complainant is of the view that the charges made for the use of the stockyards' facilities are unreasonable or otherwise improper, its remedy lies not with this Commission but with the Secretary of Agriculture. For these reasons the complaint should be dismissed.

I am authorized to say that COMMISSIONERS MEYER, PORTER, MAHAFFIE, and MILLER join in this expression.

ARGUMENT OF INTERSTATE COMMERCE COMMISSION IN ITS BRIEF IN THIS COURT IN *ATCHISON, T. & S. F. R. CO. v. UNITED STATES*, TO THE EFFECT THAT THE ENACTMENT OF SECTION 15 (5) (FEB. 28, 1920) DID NOT REDUCE OR MODIFY THE JURISDICTION OF THE COMMISSION UNDER SECTION 1 (3) OR THE OBLIGATION OF RAILROAD CARRIERS WITH RESPECT TO THE DELIVERY OF LIVE STOCK AT PUBLIC STOCK YARDS.

In *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193, 79 L. ed. 1382, the Interstate Commerce Commission filed in this court a brief (dated March, 1935) in which it argued (contrary to the decision here under review) that transportation of live stock to a public stock yard is not ended until the consignee has been afforded an opportunity to remove the stock from the carrier's possession and premises, and (contrary to the decision here under review) that section 15 (5) did not modify section 1 (3) and that the Commission's jurisdiction extends to and includes the delivery of live stock at public markets.

We quote below this argument from the Commission's said brief (at pp. 27-32 and pp. 51-59 thereof):

"The Order in Question, Directing the Correction of a Practice Which Results in the Assessment of Extra Charges Found to Be Inapplicable, Yet Imposed and Collected Upon Interstate Shipments, Is Within the Jurisdiction and Authority of the Commission Under the Provisions of the Interstate Commerce Act.

(A) The Commission's Jurisdiction Is Co-Extensive With 'Transportation', as Defined in Section 1 (3) of the Act, Including All Services in Connection With the Delivery of Property Transported.

"As pointed out by Mr. Justice Harlan in the *Covington Stock Yards case*, 139 U. S. 128, 'when livestock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading.' In other words, 'the duty

to receive, transport and deliver livestock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee.'

"The carriers transporting livestock to Chicago have made such provision under an arrangement with the Union Stock Yards & Transit Co. As found by the Commission, the Chicago Union Stock Yards are the livestock terminal at Chicago of all the individual line-haul carriers transporting livestock to Chicago, and they provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make (R. 26). As shown later (section II, *infra*) this finding of fact is supported by precedent and substantial evidence in this proceeding.

"The Commission also found that the Union Stock Yards are public stockyards. (R. 26, 28.) *But their function as public stockyards is different both factually and legally from their function as the livestock terminal or depot of the railroads. In connection with the transportation of interstate shipments of livestock consigned to these yards as a mere place of delivery, the Yards function not as a public stockyard but as the agent of the carriers in providing the facilities through which the carriers make the deliveries which they are legally obligated to make.*

"The provisions of the Interstate Commerce Act and the jurisdiction of the Commission thereunder apply to all services and charges in connection with such deliveries. Under section 1 (1) the provisions of the Act are made to apply to the interstate transportation of property, and under paragraph 3 of that section the term 'transportation' is given a special definition enlarging its ordinary meaning and causing it to embrace much more than the actual movement from origin to destination. It includes, among other things 'all services in connection with the . . . delivery . . . of property transported.'

"The term 'transportation' as defined in the Act has been construed by this Court in *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S. 588, *Southern Ry. v. Prescott*, 240 U. S. 632, and others, and these cases are here relevant because they make it clear that the Commission's jurisdiction is co-extensive with the *transportation* of interstate commerce as that term is enlarged by the statutory definition, attaching with the beginning of transportation as defined in the Act and ending only when the defined transportation terminates, because they hold that *delivery* is part of such transportation, and because they indicate when such delivery legally takes place.

"In *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S. 588, Mr. Justice Pitney referred to the letter and policy of the Commerce Act, and especially the provision of the Hepburn amendment of 1906 which enlarged the definition of the term transportation. 'From this and other provisions of the Hepburn Act,' he said, 'it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like.'

"That case related to a shipment of household goods from Denver, Colo., on September 18, 1911, to Cleveland, Ohio, where they arrived September 27 but were not called for by the consignee, and remained in the possession of the carrier as warehouseman for over a month, when part of them were lost. It was held that the 'transportation' had not ended, in view of the definition of that term in the Commerce Act.

"In *Southern Ry. v. Prescott*, 240 U. S. 632 (1916), the Court, speaking through Mr. Justice Hughes, again

had occasion to refer to the Act's definition of transportation:

By the Act to Regulate Commerce (section 1) the 'transportation' it regulates is defined as including 'all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.' It is made the duty of the carrier 'to provide . . . such transportation upon reasonable request therefor.' All charges made for 'any service' rendered in such transportation must be 'just and reasonable.' Section 6 requires that the carrier's schedules, printed as provided, 'shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee'. And it is further provided, in the same section, that no carrier shall 'extend to any shipper or person any privileges or facilities in the transportation'—that is, as defined—'except such as are specified in such tariffs'. The bill of lading in accordance with the published regulations provided that 'every service' to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express condition governing the Company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival. Such a retention of the goods was undoubtedly a terminal service forming a part of the 'transportation' in the sense of the Federal Act and governed by that Act. (*Ibid.*, 637.)

"The Court then quoted with approval the above-quoted language from the *Dettlebach* case and added

that 'the terminal services incident to an interstate shipment are within the Federal Act, * * *.' It was held that the shipment there involved was still in the course of 'transportation' though the goods had arrived at destination, notice of the arrival had been given the consignee, the entire freight charges had been paid, the consignee had given a receipt for the goods, and part of them had been taken away from the freight station.

"See also *Erie R. R. Co. v. Shuart*, 250 U. S. 465; *Loomis v. Lehigh Valley R. R.*, 240 U. S. 43; *Atchison Ry. Co. v. United States*, 232 U. S. 199, 212; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 441; *Danciger v. Cooley*, 248 U. S. 319, 327.

"Under the above decisions it is clear that property shipped *remains under transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station*; in other words, delivery is not complete until the goods are removed from the carrier's possession and premises."

"Section 15 (5) of the Interstate Commerce Act, a remedial provision, is to be liberally interpreted and not narrowly as reducing the common carrier obligations of railroads or as restricting the powers of the Commission.

"Section 15 (5) contains provisions in respect to the *charges* for the transportation by railroad of carload shipments of livestock destined to or received at public stockyards. The language of the provisions indicates that it has reference primarily to charges, by providing what shall be included in the transportation without extra charge. It provides that transportation wholly by railroad of ordinary livestock, in carload lots, destined to or received at public stockyards shall include three services 'without extra charge therefor to the shipper, consignee or owner,' namely, (a) all necessary service of unloading and reloading en route, (b) delivery at public stockyards of inbound shipments into suitable pens, (c) receipt and loading at such yards of outbound shipments.

"There is nothing in the language that seems to narrow or restrict the Commission's jurisdiction, but on the contrary it apparently enlarges that jurisdiction to the extent that under it, in connection with section 12 requiring the Commission to execute and enforce the provisions of the Act, and section 15 (1) authorizing the Commission to remove by order any violation of the Act, the Commission has the added jurisdiction to determine in any case whether an extra charge has been imposed in violation of its provisions, and in the case of inbound shipments to public stockyards, the suitability of the pen, and otherwise enforce the provision.

"The provision is remedial and would seem to be entitled to a liberal interpretation that fairly accomplishes its purpose. *New Haven R. R. v. Interstate Commerce Commission*, 200 U. S. 361, 391; *Armour Packing Co. v. United States*, 209 U. S. 56, 72. Under it it is the duty of railroads transporting ordinary livestock destined to public stockyards to make delivery at such yards 'into suitable pens.' Under a liberal interpretation of the word 'suitability' it would seem that a pen from which it is impossible for a consignee, who has gone to whatever expense and trouble may be necessary to be right there on hand at the time of the unloading of his stock, to take his shipments without extra charge, cannot be a 'suitable' pen. It might have four out of five elements of suitability. It might be safe, that is, there might be present no elements of danger, such as barbed wire. It might be bedded with straw, and it might be protected from the elements; but it would still lack one absolute essential of suitability if the person who was a party to the transportation contract and who had taken the trouble to be right there when the train came in at whatever time of day or night, could not take his stock away from the pen without the payment of extra charges. Such a pen would lack that much of being a suitable pen, and there is nothing in this provision of the Act to indicate that the Congress meant to take away from transportation the time-honored element of opportunity to accept delivery. The Commission has here held that it is not unreason-

able and not a violation of any provision of the Interstate Commerce Act to assess a charge where the stock had to be put into a holding pen until the consignee came to take. But in the case of the 15 per cent of the consignee's shipments as to which they have gone to the trouble to be there for the purpose of taking, and did take, *transportation did not cease until that opportunity to take was extended*. So long as that essential part of transportation continued, the Commission had jurisdiction and cannot escape the responsibility of acting under that jurisdiction. *If it be said that, in going out from the pen into which the livestock had been driven down from the railroad car, the stock passed over runways of the Stock Yards, by necessity of the method of construction of the Stock Yards, this could not alter the law*. This fact would emphasize the view that any such pen would not be suitable if there were an extra charge made for the passage of the livestock from the pen. Furthermore, if it be said that the stockyard facilities were a convenience to the shippers and receivers of livestock; it may be said with equal force that the stockyards were a convenience to the carriers. *They elected to make Union Stock Yards, Chicago, a station for the receipt and delivery of this character of freight, livestock, and published rates thereto, and if the location of consignee's plant be said to be favorable, it may be presumed the favorability of that location was reflected in the purchase price he paid for the plant. If it is a favorable location the railroads are not concerned. Interstate Commerce Commission v. Duffenbaugh, 222 U. S. 42, 46.*

"This same provision forbids the imposing of an extra charge for the receipt and loading at such stockyards of outbound shipments. How could livestock get into these pens without going over the roads or runways of the stockyards, any more than they could be taken out. If an outbound shipment were tendered at this station of the carriers, would they not have to receive and load without extra charge from these very pens?

"The Commission's report says the complainant did not allege that the yardage charges in issue were unreasonable if they may be lawfully applied and relied upon section 15 (5) of the Act. The complainant specifically alleged that the yardage charges are not carried in any tariff on file with the Commission and are consequently being collected without tariff authority (R. 20), and are therefore in violation of section 6 of the Interstate Commerce Act. It further alleged that the Yards Company operates public stockyards which are also operated as a depot of the railroads for the receipt and delivery of livestock at the station, Union Stock Yards; that such delivery is accomplished through the sidings, chutes and pens of the Yards Company, and that in accomplishing said deliveries that company is the agent of the railroads; that in respect of numerous carload shipments of livestock heretofore made complainant has directed that delivery be made to it at its own sidings and chutes, but defendant carriers have refused to make such delivery and have insisted that complainant take delivery through the chutes and pens of the Yards Company; that for these yardage charges neither the defendant carriers nor the Yards Company rendered any service over and above the necessary service in making delivery to complainant of its shipments of livestock as required by section 15 (5) of the Interstate Commerce Act; that the yardage charges purport to cover services rendered after transportation has been completed but that in fact, as applied to complainant's shipments, transportation is not completed until said livestock is delivered to complainant and placed in its control, and consequently said charges cover a portion of the interstate transportation services rendered. In view of these allegations it seems obvious the statement in the Commission's report above referred to means that the complainant did not allege that the yardage charges are unreasonable in instances in which yardage or other stockyards' services are actually rendered—for then and then only might the yardage charges be lawfully applied. It is obvious, too, that complainant did not rely solely

on section 15, paragraph 5, although under the above-suggested interpretation that paragraph alone would be sufficient, but aside from the statutory provisions relied upon by the complainant, the Commission could afford relief under any other provision of the Act which the established facts showed to be violated, *Chicago, Rock Island & Pacific Ry. v. United States*, 274 U. S. 29, 37.

"Appellants contend that section 15 (5) had the effect of limiting the Commission's jurisdiction, that under it the Commission no longer has jurisdiction over the entire transportation service, including delivery (*Dettl*bach case, *supra*, *Prescott* case, *supra*) but that the Commission's jurisdiction ends upon the unloading in the yard. They also contend that the provision reduces their common law duty to make delivery (*Covington* case, *supra*) and that under it their common carrier obligations end upon the unloading.

"In the *Allied Packers* case, *supra*, the Commission also carefully considered this jurisdictional question, and, *overruling the earlier decision of Division 2 in the same case and the decision of Division 1 in the Southwestern Horse & Mule* case, *supra*, held that section 15 (5) did not restrict its jurisdiction over 'transportation' as defined in section 1. It said, page 646:

The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1; or to restrict our jurisdiction.

"It held that the charges assailed in so far as they were assessed for the use of the stockyards' facilities in effecting delivery of interstate shipments were charges for transportation within the meaning of that term as defined in section 1 of the Interstate Commerce Act; and that it has jurisdiction to pass upon the *legality and reasonableness* of such charges. (Page 647). *It was there contended, as here, that section 15 (5) is a specific enactment defining transportation in so far as movements of ordinary livestock to public stockyards is concerned, and, being a later enactment than the general provision in section 1 (3), takes prece-*

edence over it." Rejecting this contention the Commission said:

The specific enactment takes precedence over the general enactment only where there is conflict between the two; in the absence of conflict both must be given effect. A specific provision that with respect to certain shipments certain services shall be included within the term transportation is not in conflict with a general provision which merely includes in the same term a great variety of services with respect to all classes of shipments. If a particular service is included in the general definition, the failure to include the same service in a specific provision covering certain shipments does not indicate an intention to exclude such services. The paragraph in question contains no words indicating an intention to repeal or modify section 1 (3), and repeals by implication will not be indulged if there is any other reasonable construction. 25 *Ruling Case Law*, page 918. (*Ibid.*, 646)

"This construction seems to be correct, in view of decisions of this Court indicating that each provision of the Interstate Commerce Act must be given a reasonable construction with a view to carrying out all the provisions of the Act. In *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 442, 443, Chief Justice White pointed out that every provision of the Act must be 'read in connection with the context of the Act' and that if 'the general terms of the section when taken alone might sanction' a construction destructive of certain rights conferred in other parts of the Act, the context must be considered and the general terms be so construed as to give full effect to the entire Act. 'The Act cannot be held to destroy itself.' In *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 567, Mr. Justice Brandeis said that the last paragraph of section 4 when read alone might compel a certain construction but that it may not be read alone. It must be construed in the light of the purpose of its enactment, of the earlier paragraphs of section 4, and other sections in the Act to regulate Commerce de-

signed to prevent unjust discrimination. In *Pennsylvania Co. v. United States*, 236 U. S. 351, 366, Mr. Justice Day said that 'while section 3 remains part of the Act in its original form, it must be given a reasonable construction with a view to carrying out all the provisions of the Act and to make every part of it effective, in accordance with the intention of Congress.'

"In support of their contention respecting this jurisdictional question appellants rely largely on what they assert to be the history of section 15 (5). *But the history of that section indicates there was no intention to restrict the Commission's jurisdiction or to modify the common law duty of carriers to make delivery of livestock without extra charge for the mere delivery.* In view of the importance of the question a full history of that provision is here given."

**ARGUMENT OF INTERSTATE COMMERCE COMMISSION IN
ATCHISON, T. & S. F. R. CO. v. UNITED STATES, TO THE
EFFECT THAT THE LEGISLATIVE HISTORY OF SECTION 15
(5) DOES NOT INDICATE AN INTENTION TO EXEMPT LIVE
STOCK FROM THE PROVISIONS OF SECTION 1 (3) AS TO
DELIVERY AT PUBLIC STOCK YARDS.**

In the same brief in *Atchison, T. & S. F. R. Co. v. United States*, *supra*, the Commission also argued (directly contrary to the decision here under review) that the legislative history of section 15 (5) indicated no intention to modify or repeal the provisions of section 1 (3) as to delivery of live stock at public markets.

We quote below this argument from the Commission's said brief (at pp. 59-69 thereof):

"History of Section 15 (5).

"Section 15 (5) was added to the Interstate Commerce Act by section 418 of Transportation Act, 1920 (41 Stat. 484, 486). Many of the important provisions of that Act were recommended by the Commission (see its 1918 and 1919 annual reports to Congress) but the provision enacted as section 15 (5) was not among its

recommendations. The original bill introduced by Congressman Esch on June 2, 1919 (H. R. 4378, 66th Cong., 1st Sess.), contained no provision bearing upon the subject matter of section 15 (5) as ultimately passed. Hearings on this bill were held before the House Committee on Interstate and Foreign Commerce during July, August, September, and October, 1919, and it was during the course of those hearings that the subject matter was first suggested. The suggestion came from Judge S. H. Cowan, Attorney for the American National Live Stock Association and the National Live Stock Shippers' League. Judge Cowan wrote to Congressman Esch asking for permission to present the views of the associations of livestock shippers. This letter, dated July 15, 1919, appears on pages 139-140 of *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 66th Cong., 1st Sess. on H. R. 4378.*

"With that letter was transmitted an 'outline of principal propositions pertaining to legislation which were adopted by the Executive Committee of the National Live Stock Shippers' League, Chicago, June 3, 1919.' Proposal No. 6 thereof was as follows:

6. Propose and urge that there be one through rate on live stock for the whole services from point of origin to the destination at public stockyards used at (as) market place which shall include unloading into suitable pens and delivery therein at such stockyards, where the animals may be counted and checked, including such facilities as are necessary or in use for making such delivery.

"On August 18, 1919, Judge Cowan appeared before the House Committee and testified at length in regard to the pending legislation. (Hearings, etc., *supra*, pages 845-892.) His statement in reference to proposal No. 6, above referred to, was as follows:

Taking the case of live stock and confining myself to that, there is a habit or custom of railroads to divide up the charges. The shipper is only concerned in getting his live stock from the point where he loads it to the ultimate market; that is, unloading it into the stockyards and get-

ting it into the hands of the commission man who sells it. It is hard for him to know what ought to be the charges if they are to be segregated into a charge for this and a charge for that and the other. I think there ought to be a requirement that as to all public markets for live stock there shall be a through rate from point of origin to destination, including a delivery into the pens to the consignee or his agent; that the railroad company should have sufficient compensation for that, of course, goes without saying.

I am just speaking in behalf of live stock. I say that this idea of adding these little charges here and there is very pernicious and hits the shipper in the face where he can not help himself, and we ought to have to all public stockyards a flat through rate to pay for the service, because the shipper is getting just one thing. He gets his stock shipped from his farm to the place where it is sold. Whatever compensation the railroad ought to have let it have it, but let it have it for doing the one thing which to the shipper is a single proposition. He never sees any of it except it is deducted out of his account of sales.

I will prepare and submit to the committee a proviso to meet that requirement, which I think ought to be enacted, * * * (*Ibid*, 874-875.)

"Later in his testimony Judge Cowan again adverted to this subject and stated:

Also with respect to the matter to which I have heretofore referred of one rate from point of origin to public stockyards that are denominated as terminals of the railroads, the depots; terminals, and public markets, there ought to be one rate just the same as if that stock pen actually belonged to the railroad. A railroad would not make two rates to its own pens if it owned and operated them, and neither should it do so with respect to pens which it uses in the same manner. There should be one fare, the same as a passenger

rate, to such depot as they use in a given city. I will submit a brief in connection with an amendment, which I will propose which will cover that point, and I will not take your time on that. (*Ibid.*, 881.)

"While the Senate bill dealing with the same subject matter (S. 3288) was under consideration, Senator Cummins, the author of the bill, on December 16, 1919, proposed the insertion of the following paragraphs as an amendment to section 15 of the Act to regulate commerce (59 Cong. Rec. 674):

Through rates for transportation wholly by railroad shall be made for the entire ordinary transportation service from point of origin to the destination and delivery at the depots, warehouses, team tracks, or other usual unloading places; and in case of ordinary live stock destined to be received at public stockyards, to include the service of unloading and delivery of inbound shipment into suitable pens, and receipt and loading of outbound shipments; such to be deemed the carrier's facilities. This provision shall likewise apply to other than ordinary live stock destined to or received from such stockyards handled in the same manner, provided that where by reason of the extraordinary value of the animals or their condition it is reasonably necessary for their proper care and handling, such additional service as is reasonably necessary in properly caring for the same, the unloading and delivery or loading thereof may be required by the carrier of the shipper, which, if not furnished by him, shall be furnished by the carrier and reasonable charge made therefor against the shipper—all of which shall be carried in tariffs and subject to the determination of the Commission.

Public stockyards are those used as facilities for handling live stock at places of sale, purchase and slaughtering, including those at which the Department of Agriculture maintains inspection of meat animals for slaughter, and such other places as

the Commission may find in common use for handling or buying and selling live stock by carloads, to be designated by the Commission."

"Thereupon Senator Cummins stated the reasons for the amendment, as follows (59 Cong. Rec. 674):

Mr. Cummins: Mr. President, this proposed amendment has been brought to my attention by the American National Live Stock Association, of which Judge Cowan, of Fort Worth, is the general counsel.

The reasons that have been submitted to me for the adoption of the amendment are that it has become the practice of the railroad companies, or those connected with the railroad companies, to separate their charges, and when a shipper, especially a live stock shipper, asks what the rate is from the point of origin to the point of delivery, which is a stockyard, the rate is given according to the published tariff, and then the railroad company adds to the rate a series of charges for various services performed in connection with the transportation of the live stock, so that the shipper does not know from time to time what it will cost him to have his stock delivered at the point to which he ships it.

I am entirely in sympathy with the purpose of these shippers, and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rate that must be paid by the shipper for the entire service of taking the property at the point of origin and delivering it to the point at which it is to leave the car. I think it is an amendment which will tend toward the protection of those who have occasion to use the railroads in the shipment especially of live stock.

"6. There were a number of prints and reprints of several bills. H.R. 10453, as amended in the Senate, struck out all after the enacting clause and substituted an entirely new bill. The above-quoted amendment, proposed by Senator Cummins, appeared in the reprint of December 20, 1919, of H.R. 10453, as the fifth and sixth paragraphs of a proposed amendment to section 15 of the Act to Regulate Commerce, pages 179-180."

"The amendment was agreed to. (*Ibid.*)"

"February 21, 1920, the conference report on the bill was read in the House. In conjunction with their report the House managers made the following statement (59 Cong. Rec. 3264):

Transportation of Live Stock—

(Section 418 of the conference bill.)

Section 44 of the Senate amendment provided that through rates on live stock should include *unloading and other incidental charges* in the case of shipments consigned to public stockyards. The House bill contained no reference to this matter. The conference bill *amplifies* the provision of the Senate amendment and provides that 'transportation wholly by railroad of ordinary live stock in earload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge to the shipper,' with certain exceptions concerning which the commission may prescribe rules. (*Italics supplied.*)

"As so amplified the provision was agreed to by both Houses and enacted as paragraph numbered 5 of section 15.

"It thus appears the provision was not intended to be directed solely to loading and unloading charges but was much broader in its scope and embraced all extra charges of whatever nature in addition to the published tariff rate.

"Nor was there any thought of restricting the Commission's jurisdiction, but the purpose was to remedy by specific statutory enactment a practice regarded as an evil. It was the intention, clearly expressed by the author of the provision, 'to bring the whole subject within the jurisdiction of the Interstate Commerce Commission.' *Nor was there any thought or purpose of limiting the common carrier obligations of the railroads so that they would end upon the unloading of the stock into suitable pens.* The decision of this Court in the *Covington Stock Yards* case, holding that it was

the obligation of the carrier to receive live stock and carry it to its destination and there deliver it to the consignee without an extra charge, was called to the attention of the lawmakers, and the purpose of the enactment was to enforce the principle of that decision rather than reduce the common-carrier obligations as there expounded.

"It is true of course that in the great majority of instances the transportation of live stock to public stockyards does end upon the unloading of the animals into suitable pens, *because the great bulk of live stock shipments to public stockyards are intended for commission men and traders doing business in the yards.* In such instances a stockyards' service is furnished and when that is so the common-carrier transportation, and consequently the jurisdiction of this Commission; ends upon the unloading and thereupon the jurisdiction of the Secretary of Agriculture under the Packers & Stockyards Act begins. The decision of the Supreme Court of Missouri in *Burton v. Wabash Ry. Co.*, 58 S. W. (2d) 443, so holds, the live stock shipments there involved, transported from a point in Missouri to the public stockyards at East St. Louis, Ill., having been consigned to a commission merchant doing business at the stockyards. But it is shown by the decision of this Court in the *Covington* case, by the decisions of the Commission in the *Allied Packers* case, in the *Kahn* case, in the *Gobel* case, and in the case at bar, *that public stockyards frequently function in another capacity, and that is as a place of receipt and delivery, a live stock depot, for the railroads; and under the above decisions where the consignee seeks no stockyards' services but takes delivery at the time of unloading of the animals from the car and drives them directly out of the yards, no extra charge may be made for that privilege.* There is nothing in the language of section 15 (5), nothing in its legislative history, nothing in the Packers & Stockyards Act, and nothing in the legislative history of that Act to indicate an intention to relieve common carriers from their time-honored duty of making delivery of live stock without extra charge through their established live stock terminal, whether owned by themselves or hired from somebody else."

ARGUMENT OF INTERSTATE COMMERCE COMMISSION IN ITS BRIEF IN *ATCHISON, T. & S. F. R. CO. v. UNITED STATES* TO THE EFFECT THAT NOTHING IN THE PACKERS AND STOCKYARDS ACT, 1921, NOR THE LEGISLATIVE HISTORY THEREOF, AFFECTS THE JURISDICTION OF THE COMMISSION UNDER THE INTERSTATE COMMERCE ACT.

In the same brief in *Atchison, T. & S. F. R. Co. v. United States, supra*, the Commission also argued (directly contrary to the decision here under review) that the *Packers and Stockyards Act, 1921*, and the legislative history thereof, indicated no intention to transfer from the Commission to the Secretary of Agriculture jurisdiction over the delivery of direct shipments of live stock at public stock yards in cases where no stock yard service, but only a delivery to the consignee, is desired.

We quote below this argument from the Commission's said brief (at pp. 48-51 thereof):

"Legislative History of Packers & Stockyards Act Discloses Intention Not to Restrict Jurisdiction of Commission.

"In support of their argument that the yardage charges in question are subject to the jurisdiction of the Secretary of Agriculture and not the Commission's, the appellants in No. 606 quote in part (brief, pp. 24-25) the statement of the Chairman of the House Committee on Agriculture (Congressman Haugen) at the time the bill which later became Packers & Stockyards Act, 1921, was under consideration. This statement was made orally upon the floor of the House, in explanation of the bill, and is here quoted in full:

It is proposed to give the Secretary of Agriculture jurisdiction over the packers, stockyards commission men, traders, buyers, and sellers, and all activities connected with the slaughtering and marketing of live stock and live-stock products in interstate commerce; that is, the Secretary shall have jurisdiction from the time the live stock is unloaded at the terminal yards and after it is

out of the jurisdiction of the Interstate Commerce Commission.

Up to the time of unloading the live stock the Interstate Commerce Commission has jurisdiction over the shipment, distribution, and ownership of stock, refrigerator cars, and other equipment, and transportation rates, including belt lines and terminal roads. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends; or, in other words, the Interstate Commerce Commission is to continue its exclusive jurisdiction over transportation rates and compelling the carriers to furnish refrigerator and stock cars, and so forth, and *the Secretary is to have exclusive jurisdiction over all transactions connected with the slaughtering and marketing of live stock and live stock products in interstate commerce, subject, of course, to court review; * * ** (Congressional Record, 67th Congress, 1st Session, Vol. 61, Part 2, Page 1800.)

"The Congressman's statement as to the jurisdiction of the Commission seems correct as far as it goes, but was not necessarily intended to be a full, detailed, complete, or exhaustive statement of the Commission's jurisdiction. It is no doubt true that ordinarily the jurisdiction of the Commission over shipments of live stock to public stockyards ends with the unloading, because in the great majority of instances such live stock is consigned to commission men doing business at the yards, utilizing stockyards' facilities and services, and upon the unloading of their stock in the yards, transportation ends. *In several cases the Commission has denied its jurisdiction beyond the unloading in cases where the consignees have obtained stockyards services as distinguished from mere delivery service. Kahn v. B. & O., 192 L. C. C. 705; Gobel v. B. & O., 200 L. C. C. 606.* Apparently the Chairman of the Committee on Agriculture, in making his oral statement to the House, did not have in mind instances in which, through arrangement with the railroads, the stockyards function.

as the live stock terminal of the railroads, and did not have in mind at the moment the large number of authorities, including the decision of this court in the *Covington Stock Yards* case, that in such circumstances the consignee is entitled to delivery without the assessment of a special charge. Under the circumstances it seems that the Congressman's statement is not to be taken as conclusive, and as not binding upon this Court if it finds that under the provisions of the Interstate Commerce Act the Commission does have jurisdiction under the facts disclosed in the instant case.

"It may be added that in the written committee report (House Report No. 77, 67th Congress, 1st Session submitted by Mr. Haugen from the Committee on Agriculture) the only reference to the question of jurisdiction as between the Secretary of Agriculture and the Interstate Commerce Commission appears on the last page of the report (page 16), which states that section 406 of the bill, H. R. 6320, as favorably reported by the Committee,

makes it clear that the Interstate Commerce Act (Commission) is not to be deprived of its existing jurisdiction over terminal railways in the stock yards or over any other matter now subject to its control. (Italics supplied.)"

This argument of the Commission in support of its own jurisdiction, rather than that of the Secretary of Agriculture, appears to have been affirmed and settled in favor of the Commission in *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, where this court said (pp. 200, 201):

"If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission."

THE DEMANDS OF APPELLANTS UPON THE RAILROAD DEFENDANTS WHICH PRECEDED THE FILING OF THE COMPLAINT WITH THE COMMISSION DEFINITELY ENDED THE AGENCY OF THE STOCK YARD COMPANY TO RECEIVE APPELLANTS' SHIPMENTS AND FURNISH A STOCK YARD SERVICE.

In paragraph 11 of the complaint in the District Court (R. p. 5) appellants alleged that the Commission erred in the findings of fact appearing at pages 183-184 of its decision (R. pp. 39, 40) concerning the demands made by appellants prior to the filing of the complaint and the action of the railroad defendants upon those demands. It may be conceded that the summary statement made by the Commission is not substantially in error, but for a complete understanding of the transactions we set forth at length the facts of record upon this point.

In a decision in *E. Kahn's Sons Co. v. Baltimore & O. R. Co.*, 192 I. C. C. 705 (April 10, 1933), the Commission held (p. 709):

"The shipping public is entitled to reasonably convenient and safe chutes, pens, and ways for discharging livestock from the cars, and taking them from the carriers' premises without a yardage charge. Not until the livestock can be so removed does the line-haul transportation cease."

The decision indicated that the Cincinnati Union Stock Yards (which was involved in that case) is a public stock yard (like that at Chicago) not owned or operated by the railroad carriers.

APPELLANT'S DEMANDS IN MAY, 1933, AND REPLIES THERETO.

Appellant (Swift and Company) considered this declaration of law by the Commission and on May 9, 1933, approximately one month after the decision of the Commission in the *Kahn* case, addressed identical letters to each

of the line haul railroad defendants reaching Chicago, reading as follows (exhibit 2, pp. 191-230):

"Numerous direct shipments of live stock are consigned via your line of railroad to Swift & Company, or its subsidiaries, at the Union Stock Yards, Chicago, Ill. By direct shipments are meant shipments in which Swift & Company, or its subsidiaries, are shown as the consignees on the railroad billing at point of origin; which are not purchased on the property of the Union Stock Yard & Transit Company at Chicago; and as to which no use is made of Union Stock Yard & Transit Company services or facilities except such as is incident to the completion of the transportation contract.

"When such shipments are delivered to Swift & Company or its subsidiaries through the facilities of the Union Stock Yard & Transit Company of Chicago, Swift & Company, up to this time, has been required to pay not only the transportation rate of your railroad to Union Stock Yards, Chicago, Ill., but, in addition thereto, the yardage charge assessed by the Union Stock Yard & Transit Company of Chicago; regardless of the fact that Swift & Company's employees may have performed the entire service rendered subsequent to the unloading of the live stock at the unloading chutes.

"Swift & Company is advised that the carriers have no legal right to effect such a delivery of live stock as results in requiring Swift & Company to pay yardage charges to the Union Stock Yard & Transit Company of Chicago on such direct shipments, as to which no yardage service is desired or received. Swift & Company is prepared to accept such shipments at reasonable and proper delivery pens of the carrier at the Union Stock Yards and, within a reasonable time, to remove the live stock therefrom to its own plants without other use of the facilities of the Union Stock Yard & Transit Company of Chicago.

"In order that Swift & Company and its subsidiaries may not further be subjected to said yardage

charges of the Union Stock Yard & Transit Company upon such direct shipments, which it is advised are unlawful, this is to notify you that, on and after May 25, 1933, Swift & Company will be prepared to accept, at such reasonable and proper delivery pens of the carrier at Union Stock Yards, Chicago, all shipments of live stock consigned direct to Swift & Company or its subsidiaries at Union Stock Yards, Chicago, Ill., and to remove same within a reasonable time thereafter; and that on and after said date Swift & Company will refuse to pay to the carriers, or to the Union Stock Yard & Transit Company of Chicago, any yardage charge upon shipments of live stock so delivered by the carrier and so accepted and removed by Swift & Company and its subsidiaries and its or their employees at and from such reasonable and proper delivery pens of the carrier, at Union Stock Yards, Chicago."

A copy of this letter was sent to The Union Stock Yards and Transit Company of Chicago on the same date with a letter to the stock yard company reading as follows (exhibit 2, p. 109):

"Kindly accept this as official notice that on and after May 25, 1933, we shall not pay yardage charges on direct shipments of live stock received or accepted by us in the manner outlined in said letter."

It should be remembered that The Union Stock Yard and Transit Company of Chicago had on file with the Commission a tariff (R. p. 181) naming loading and unloading charges, in which it designated itself as *carrier's agent*, and that the Commission has held that to the extent of this service it was and is a common carrier. *Union Stock Yard & T. Co. v. United States*, 308 U. S. 213, 84 L. ed. 198. Consequently this notice to it was not a notice merely to a stock yards, but to a *common carrier* acting as railroad defendant's *agent* in the delivery of live stock.

On May 10, 1933, the Union Stock Yard and Transit Com-

pany replied to appellant's said letter of May 9, 1933 as follows (exhibit 2, pp. 107-108):

"The Union Stock Yard and Transit Company of Chicago begs to acknowledge receipt of your favor of the ninth instant, which for purposes of your convenience we have symbolized as you symbolized your letter.

"This Company also acknowledges receipt of what purports to be a copy of a letter (symbolized as above) sent by you to various railroad officials in Chicago and elsewhere, dated as of the same date.

"On behalf of The Union Stock Yard and Transit Company of Chicago I beg to hereby formally advise you that the property of the Union Stock Yard and Transit Company of Chicago is its private property and that its tariffs are on file with properly constituted authorities.

"So long as Swift & Company route or permit or cause to be routed their shipments of live stock to themselves at the yards of this Company, the Union Stock Yard and Transit Company of Chicago will insist on the payment of its yardage charges before such live stock is released.

"We observe in your letter to the carriers that you say you are prepared to accept shipments at reasonable and proper delivery pens of the carrier at the Union Stock Yards.

"You hereby are notified that the carriers to which your letter purports to be addressed do not own or control any facilities or property at the yards of this Company which can be used either by consignees of live stock consigned to the yards of this Company or by the carriers, for the delivery of live stock after unloading, without the payment of the yardage charges imposed by this Company for the use thereof.

"Until and unless your threat of not paying the tariff yardage charges of The Union Stock Yard and Transit Company of Chicago is withdrawn, or until and unless such charges are paid, this Company will not permit live stock consigned to you at its yards to be delivered to you or to your employees, on and after May 25, 1933."

On May 16, 1933, appellant (Swift and Company) addressed identical letters to the various line haul railroads reaching Chicago reading as follows (exhibit 2, pp. 149-188):

"As a matter of information, we furnished the Union Stock Yard & Transit Company of Chicago, Illinois, a copy of our letter to you, dated May 9, 1933, concerning shipments of live stock consigned to us at Union Stock Yards Station, Chicago, Illinois. Please take notice of the matters stated in its response to us, dated May 10, 1933, copy of which is attached.

"You are hereby notified that on and after May 25, 1933, the Union Stock Yard & Transit Company of Chicago, Illinois, has no authority, after unloading such livestock as your agent, in accordance with its tariff, to thereafter accept, or receipt for such live stock for us, as our agent, for our account, or in our name. On and after May 25, 1933, any delivery by your railroad of our live stock to the Union Stock Yard & Transit Company of Chicago, Illinois (other than delivery of such live stock to the Union Stock Yard & Transit Company of Chicago, Illinois, as your agent for unloading and delivery to us) will constitute a conversion of our property. Any payment by us of yardage or other charges to the Union Stock Yard & Transit Company of Chicago, Illinois, made to gain possession of such property on and after said date, will be under protest, will be for your account and will be made purely in mitigation of damages."

On May 16, 1933, appellant (Swift and Company) also addressed a letter to The Union Stock Yard and Transit Company of Chicago reading as follows (exhibit 2, pp. 189-190):

"Receipt is acknowledged of yours of May 10, in response to ours of May 9, enclosing copy of our letter of even date therewith to officials of various line haul carriers now publishing rates to, and making deliveries of live stock at, Union Stock Yards Station, Chicago, Illinois, as described in their respective tar-

iffs lawfully on file with the Interstate Commerce Commission.

"We have passed the information contained in your letter on to each of the respective line haul carriers, as per copy of letter attached hereto.

"You are hereby advised that any and all live stock which, on or after May 25, 1933, may be delivered to you by said carriers as their agent for unloading (as provided in your tariff No. 5, I. C. C. No. 8) and for delivery to us as consignee in accordance with the respective contracts of carriage covering the same, will be accepted and received by us from said carriers (or from you as their agent) and promptly removed from your premises after such acceptance and receipt.

"You are further notified that as to such stock, we do not desire, and will not accept, receive, or pay for any service or use of facilities beyond the unloading pens which you provide for the carriers as their agent.

"You are further notified that on and after said date you have no authority to accept, handle, or receipt for such live stock, after unloading, and until delivery to us, as our agent, on our behalf, in our name or for our account.

"You are further advised that at the time such stock is delivered to you by said carriers as their agent, most of the said shipments will be in interstate commerce and will continue to be in interstate commerce until said contracts of carriage are fully performed by delivery of lading covered thereby to us, the consignee thereof. We will hold you strictly accountable for any interference therewith or for any delay in the prompt delivery thereof in accordance with said contracts for interstate carriage.

"Any payments which may be made by us to you on and after May 25, 1933, on such shipments, will be made under protest, solely for the carriers' account, and in mitigation of damages caused by the carriers' failure to make delivery of said stock to us as required by their respective contracts of lading covering such shipments."

In response to the letters to the railroads, appellant

(Swift and Company) received identical replies from the railroads, most of them dated May 19, 1933 and reading as follows (exhibit 2, pp. 111-A-148):

"I have your two letters of May 9, 1933 and May 16, 1933 relative to the assessment and collection of yardage charges on live stock consigned to you at Union Stock Yards, Chicago, Illinois.

"Pleased be advised that the yardage charges to which you refer in your letter of May 9 are not published in any tariff of this company and are not assessed or collected by it or for its account. Inasmuch as this company does not collect these charges from you directly or indirectly, does not receive any part of them and is not responsible for their collection, I do not see how any action can be taken by it. Your protest with respect to the charges should be directed to the party assessing and collecting them.

"In your letter of May 16, you state that on and after May 25, 1933, the Union Stock Yard & Transit Company will have no authority to accept or receipt for such live stock as your agent, and you also state that any delivery by this company of live stock consigned to you to the Union Stock Yard & Transit Company of Chicago, other than a delivery made as the Agent of this company for handling and delivery to you, will constitute a conversion of your property. These statements are apparently made under a misapprehension of fact. So far as I know, the Union Stock Yard & Transit Company of Chicago has never accepted or receipted for live stock consigned to you as your agent or for your account. Moreover, this company does not make delivery of live stock consigned to you to the Union Stock Yard & Transit Company of Chicago. On the contrary, such deliveries are made by this company in suitable pens at the Union Stock Yards at Chicago strictly in accordance with your instructions.

"If after May 25, 1933, you desire live stock consigned to you at Chicago, delivered at some point in Chicago other than the Union Stock Yards, please advise me."

On May 24, 1933, appellant (Swift and Company) ad-

addressed to The Union Stock Yard and Transit Company of Chicago a letter reading as follows (exhibit 2, p. 106):

"Will you please refer to the correspondence that has passed between us with respect to the delivery of direct shipments of live stock consigned to this company at Union Stock Yards, Chicago, on and after May 25, 1933? As you were advised, we had planned to make a demand for delivery of such stock at the unloading pens as soon as the stock was unloaded and the right to promptly remove such stock without the payment of your yardage charges. In your letter to us of May 10, you advised that you would not permit such delivery of such stock without payment of your yardage charges, and that this refusal would be maintained in the event of a physical demand by our representatives for the delivery of such stock without the payment of such yardage charges. It is our understanding that, in view of your refusal to permit the removal of such stock from your premises without the payment of such yardage charges, it will be unnecessary for us to make such a demand. Please be advised that we are willing, from time to time on and after May 25, 1933, to pay your yardage charges on such stock if such charges are received by you as being paid under protest and in mitigation of damages, and also if it is understood that with respect to each and every of such shipments a physical demand for delivery and the right to remove such stock without payment of such yardage charges is considered as having been made and refused, and that such demand would actually have been made but for your advice that the same would be continuously refused."

On the same date the Union Stock Yard and Transit Company replied to said letter from appellant by a letter reading as follows (exhibit 2, p. 105):

"I have your letter of May 24th referring to the correspondence between us with respect to the delivery of shipments of live stock consigned to your company at Union Stock Yards, Chicago, on and after May 25, 1933.

"This company is willing to make a delivery of all

such shipments to you at the pens into which said shipments are unloaded from the cars, but you are correct in your understanding that the removal of said shipments from these pens over the property of this company will not be permitted unless you then pay the yardage charges or agree to pay them in the future.

"This company is willing, from time to time, to accept the payment of its yardage charges on such stock on and after May 25, 1933, with the understanding that such payments are made under protest and in mitigation of damages. It is also agreeable to us that it be understood that with respect to each and every of said shipments, a physical demand for delivery and for the right to promptly remove such stock without payment of such yardage charges is to be considered as having been made by you as soon as the stock is unloaded, and refused by this company, immediately after unloading, and that such demand would have actually been made but for our advice to you that the same would be continuously refused."

On May 31, 1933, appellant (Swift and Company) addressed identical letters to the various railroads entering Chicago reading as follows (exhibit 2, pp. 85-104):

"Attached hereto are copies of letters dated May 24, 1933, exchanged between Swift and Company and The Union Stock Yard and Transit Company of Chicago, with reference to the handling of direct shipments of live stock consigned to Swift and Company at Union Stock Yards, Chicago, Illinois, on and after May 25, 1933, and payment of yardage charges of The Union Stock Yard and Transit Company of Chicago on such shipments.

"You are advised that upon consideration we were of opinion that the damages resulting from your failure to make delivery of these direct shipments of live stock, without payment of yardage charges, as heretofore demanded by us in our letter of May 16, 1933, would be minimized to the greatest extent by our payment of such yardage charges under protest for your account, as outlined in the attached correspondence.

"You will please be advised that the making of this arrangement was solely for the purpose of minimizing the damages resulting from your failure to make a lawful delivery of such live stock, and that by such an arrangement we do not waive any right or claim heretofore asserted in our previous correspondence on this subject."

In response to the letter from said appellant, dated May 31, 1933, the various railroads addressed to appellant identical letters, nearly all of which are dated June 12, 1933 and read as follows (exhibit 2, pp. 64-84):

"I have your letter of May 31, file A-26953, relating to the payment of yardage charges on direct shipments consigned to you at the Union Stock Yards, Chicago, with which you enclosed copies of letters interchanged between your company and the Union Stock Yard & Transit Company, under date of May 24, 1933.

"As I have heretofore advised you, this company has nothing whatever to do with the assessment and collection of yardage charges at the Union Stock Yards, Chicago, upon direct shipments of live stock consigned to you at that point. Such charges are not published in any tariff of this company, are not assessed or collected by it, and it receives no part of them. Moreover, as I have also advised you, all direct shipments of live stock consigned to you at the Union Stock Yards, Chicago, and unloaded and delivered to you at that point, are so consigned and delivered upon your specific instructions to this company. The matter of yardage charges on such shipments, referred to in your letter of May 31, is a matter which lies entirely between you and the Union Stock Yard & Transit Company of Chicago and with respect to which you have the right to make any arrangements you wish. Since this company is not responsible for the assessment and collection of the yardage charges of which you complain, there is certainly no liability with this company because of their assessment and collection."

Thereafter appellant (Swift and Company) rendered

against each railroad bills covering the amount of the yardage charges assessed by the stock yards on shipments transported to Chicago by the particular railroads. Each of these bills was declined. Letters typical of those addressed by the railroads to appellant, declining to pay the bills for such yardage charges, are to be found at pages 48-63, inclusive, of exhibit 2.

APPELLANT'S FURTHER DEMANDS ON RAILROADS IN SEPTEMBER, 1935, AND REPLIES THERETO.

Appellant (Swift and Company) was an intervener in the proceeding before the Commission known as *Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, in which the Commission entered an order requiring egress without extra charge. If the order of the Commission in that case had been sustained, substantially the relief demanded by appellant in the letters above quoted would have been afforded, and it would probably have been unnecessary for appellant later to bring an independent proceeding. The order of the Commission in that case, however, was vacated and set aside by the Supreme Court in *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193, 79 L. ed. 1382, the decision having been announced April 29, 1935. In that decision the Supreme Court said, amongst other things (pp. 200-201):

"The Hygrade Company did not seek and the Commission did not grant relief upon the ground that the carriers failed to provide egress from the unloading pens in the public stockyards to the city streets by means of which consignee's animals might be removed to its plant. * * * Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways."

Having considered this decision of the Supreme Court and entertaining some doubt as to whether the demands

made upon the carriers in 1933 exceeded the duties of the railroad carriers as indicated in said decision of the Supreme Court, appellant (Swift and Company) decided to make a further demand upon the railroads which would be clearly within the limitations stated by the Supreme Court. As a result of this consideration of the decision of the Supreme Court, on September 9, 1935 said appellant and certain other packing companies addressed identical letters to the Chicago railroads reading as follows (exhibit 2, pp. 40-45):

"Numerous direct shipments of live stock are consigned via your line of railroad to Swift & Company, Armour and Company, Wilson & Company, or the subsidiaries of each of them, at Union Stock Yards, Chicago, Ill., hereinafter collectively referred to as the 'packers'. By direct shipments are meant shipments in which the packers are shown as the consignees on the railroad billing at point of origin; which are not purchased on the property of the Union Stock Yard & Transit Company at Chicago; and as to which no use is made of Union Stock Yard & Transit Company services or facilities except such as is incident to delivery of such live stock under the transportation contract.

"When such shipments are delivered to the packers through the facilities of the Union Stock Yard & Transit Company of Chicago, the packers are required to pay not only the transportation rate of your company to Union Stock Yards, Chicago, Ill., but, in addition thereto, the yardage charge assessed by the Union Stock Yard & Transit Company of Chicago for the use of its facilities; regardless of the fact that the packers' employees may have performed or been ready and willing to perform the entire service necessary after unloading of the live stock at the unloading chutes.

"The packers are advised that the carriers have no legal right to effect such a delivery of live stock as results in requiring them to pay yardage charges on such direct shipments.

"The packers are prepared to accept such shipments

at suitable delivery pens at the Union Stock Yards, Chicago, and immediately to remove the live stock from such unloading pens to a public street by a proper and convenient means of access to the street to be designated by you, without other use of the property of the Union Stock Yard & Transit Company of Chicago.

"It is appreciated that there is no other means of egress from your present unloading facilities to a public street except over the property of the Union Stock Yard & Transit Company of Chicago; that in order to effect deliveries in the manner to which the packers believe they are entitled, without payment of the present yardage charge, it will be necessary for you to make proper arrangements for the purpose of egress from the unloading pens to a public street with the Union Stock Yard & Transit Company. If, as a result of such arrangements, you should desire that we accept the live stock, without payment of yardage, at some reasonable and convenient point to be agreed upon between your company and the Union Stock Yard & Transit Company, other than the unloading pens, such an arrangement will be agreeable to the packers. It is also understood by us that, until such an arrangement with the Union Stock Yard & Transit Company is perfected by you and a means of egress or a convenient delivery point is designated, it will be necessary for us to pay the published yardage charges of the Union Stock Yard & Transit Company of Chicago upon such direct shipments.

"In order that the packers may not further be subjected to such yardage charges upon direct shipments, this is to notify you that, on and after September 20, 1935, the packers will be prepared to accept, at suitable delivery pens in the Union Stock Yards or at such other delivery point as may be agreed upon by negotiations between your company and the Union Stock Yard & Transit Company, all shipments of live stock consigned direct to the packers, at Union Stock Yards, Chicago, Ill., and to remove the same immediately thereafter from the delivery pens or the designated

delivery point. In the meantime, in order to obtain delivery of their live stock and to minimize the losses which would occur if they were denied delivery of their live stock, the packers will continue to pay the published yardage charges of the Union Stock Yard & Transit Company as set forth in its tariffs on file with the Secretary of Agriculture; but this is to notify you that such yardage charges will be paid by the packers for your account and that until the arrangement here sought is perfected and put into effect, the packers will promptly render against your company bills for such yardage charges and will use all lawful means to enforce collection of such charges from your company.

"To summarize, this demand is merely for egress from the unloading pens used by your company at the Union Stock Yards, Chicago, to city streets or to such other reasonable and convenient delivery point as may be agreed upon by such convenient and reasonable route as may be designated by you or your company and the Union Stock Yard & Transit Company."

"This identical letter is being sent today to the vice president in charge of traffic of each line haul carrier which brings live stock to the Union Stock Yards at Chicago."

"Kindly advise whether you will afford the facilities necessary to this method of delivery by you and acceptance by the packers of direct shipments of live stock, on and after the date above mentioned. For the purpose of facilitating early adjustment of this matter, the packers would appreciate meeting at the earliest possible date with you or with such a committee of the executive officers of the interested carriers as you may appoint. A prompt reply will be appreciated."

To this letter of September 9, 1935, the Chicago railroads made identical replies, most of which are dated September 17 or 18, 1935, reading as follows (exhibit 2, pp. 1-39):

"We have your joint letter of September 9th with

reference to yardage charges on direct shipments, in which letter you state that:

'On and after September 20, 1935, the packers will be prepared to accept at suitable delivery pens in the Union Stock Yards, or at such other delivery point as may be agreed upon by negotiation between your company and the Union Stock Yards and Transit Company, all shipments of live stock consigned direct to the packers at Union Stock Yards, Chicago, Illinois, and to remove the same immediately thereafter from the delivery pens or the designated delivery point.'

"You further state, in substance that you do not desire to pay the yardage charges published by the Union Stock Yard & Transit Company with the Secretary of Agriculture, on shipments destined to or received at public stock yards on your behalf, and that:

'The packers will continue to pay the published yardage charges of the Union Stock Yard & Transit Company as set forth in its tariffs on file with the Secretary of Agriculture; but this is to notify you that such yardage charges will be paid by the packers for your account and that until the arrangement here sought is perfected and put into effect, the packers will promptly render against your company bills for such yardage charges and will use all lawful means to enforce collection of such charges from your company.'

"Your letter is substantially similar in tenor and effect to letters of May 9th and May 16th, 1933, to which reply was transmitted on behalf of this company under date of May 19, 1933. There is therefore no need to discuss the situation further. It might be added, however, that this company has no power or authority over the yardage charges published and assessed by the Union Stock Yard & Transit Company which is a public utility subject to regulation in respect to its services and charges.

"Since the shipments referred to in your letter are destined to, or received at, a public stock yard, the services of a common carrier ceases when the shipments are unloaded into suitable pens and we cannot

accept in any form, responsibility for any charges thereafter made by the Union Stock Yard and Transit Company as a public stock yard.

"So long as you desire to continue the long established practice of insisting upon receipt of your direct shipments of live stock at the public stock yards, any dissatisfaction you may have with respect to either facilities or charges should be expressed to the Union Stock Yard and Transit Company which organization has the responsibility therefor."

Thereafter, and before the expiration of the two-year period of limitations, appellants filed their complaint before the Interstate Commerce Commission. That complaint was drafted after consideration of the decision of the Supreme Court in *Atchison, T. & S. F. R. Co. v. United States, supra*. The prayer of the complaint was that an order be entered requiring the railroad defendants to afford appellants delivery of their direct shipments of live stock to the Union Stock Yards, Chicago, Ill., "at reasonably convenient, safe, and suitable chutes, pens, and ways, and be permitted egress for removal from said unloading pens of such live stock to the nearest public street, via the shortest or most convenient way, to be designated by defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yard and Transit Company of Chicago, and without payment of any charges other than the lawful transportation charges of the defendants for the transportation of such direct shipments from the origin thereof to the Union Stock Yards in Chicago".

DEMAND UPON THE RAILROADS PRIOR TO RESORT TO COMMISSION
WAS PROPER.

The original demand was based upon the decision of the Commission in *Allied Packers v. Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, and *E. Kahn's Sons Co. v. Baltimore & O. R. Co.*, 192 I. C. C. 705. The later demand was based upon the decision of the Commission in *Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C.

553, and the decision of the Supreme Court in *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193, 79 L. ed. 1382.

We mention this fact because of the comment of the Supreme Court in *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, reading as follows (p. 198):

"In 1933 petitioner, without resort to the Interstate Commerce Commission, demanded that the railroads alter this long-standing practice so as to relieve it from payment of this additional charge."

We respectfully suggest that the demand, prior to resort to litigation, was proper. It merely requested the railroad defendants to give effect to a ruling of general application made by the Commission. This is upon the theory that any decision made by the Commission is not merely for the private benefit of the parties but lays down a rule of which any member of the public may take advantage after such rule has been made. This is the doctrine of *A. J. Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662, 59 L. ed. 774, where the court said (p. 665):

"But the proceeding before the Commission, to determine the reasonableness of the 2-cents advance, was not in the nature of private litigation between a lumber association and the carriers, but was a matter of public concern in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. The finding thereon was general in its operation, and inured to the benefit of every person that had been obliged to pay the unjust rate. Otherwise those who filed the complaint, or intervened during the hearing, would have secured an advantage over the general body of the public with the result that the order of the Commission would have created a preference in favor of the parties to the record, and would have destroyed the very uniformity which that body had been organized to secure. The plaintiff and every other shipper similarly situated was entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order."

DISCUSSION OF THE DECISIONS UPON WHICH THE COMMISSION BASED ITS FINDING THAT THE SECRETARY OF AGRICULTURE HAS ASSERTED JURISDICTION OVER CHARGES FOR MERE EGRESS FROM RAILROAD CARS TO A PUBLIC STREET.

In paragraph 18 of the complaint in the District Court (R. p. 14) appellants alleged that the Commission erred in the following findings of fact and conclusions of law (R. pp. 53, 54):

"In the administration of the Packers and Stockyards Act, the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at *many* public yards. Orders of the Secretary prescribing the charges for this service at three public stockyards have been sustained in court proceedings. See *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38; *Denver Union Stock Yards Co. v. United States*, *supra*; *Union Stock Yards Co. of Omaha v. United States*, 9 Fed. Supp. 864. The yardage charges now applicable at the public stockyards at St. Joseph, Mo., Denver, Colo., and Omaha, Nebr., for use of facilities and services of the yard companies in connection with egress for direct shipments consigned to packers are those prescribed by the Secretary."

This is a startling error. It will be noted here that the Commission says that the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at *many* public yards and that such orders have been sustained in two cases in the United States Supreme Court and one in the Federal District Court, namely:

St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 80 L. ed. 1033;

Denver Union Stock Yard Co. v. United States, 304 U. S. 470, 82 L. ed. 1469; and

Union Stock Yards Co. of Omaha v. United States, 9 F. Supp. 864.

These are the only three stock yards concerning which there was evidence in this record of fixation of rates of any character by the Secretary. Consequently the word *many* is without any support of record.

The court may read these three decisions with care, and the orders of the Secretary therein, and it will find that they contain not a word, phrase, or sentence referring to *mere egress* at the public stock yards there involved or to the jurisdiction of the Secretary over such service. These decisions show nothing to support the finding of the Commission. It will also be readily understood that such an issue could not have arisen in those cases.

The affirmative proof of this fact fortunately is in the record. The carrier defendants introduced as exhibit 41 the decision in Bureau of Animal Industry docket No. 450, *Secretary of Agriculture v. Denver Union Stock Yard Company*, which is the decision and order of the Secretary reviewed in *Denver Union Stock Yard Co. v. United States*, 304 U. S. 470, 82 L. ed. 1469. (This case is cited by the Commission as abolishing the rule of the *Covington* case, 139 U. S. 128, 35 L. ed. 73, but cited by the Supreme Court to the contrary effect in *Union Stock Yard & T. Co. v. United States*, 298 U. S. 213, 219, 84 L. ed. 198).

The carrier defendants offered in evidence as exhibit 42 the decision in Bureau of Animal Industry docket No. 344, *Secretary of Agriculture v. Union Stock Yards Company of Omaha, Ltd.*, which was the decision and order of the Secretary sought to be annulled in *Union Stock Yards Co. of Omaha v. United States*, 9 F. Supp. 864.

They also offered in evidence as exhibit 43 the decision in Bureau of Animal Industry docket No. 298, *Secretary of Agriculture v. St. Joseph Stock Yards Company*, which was the decision and order of the Secretary reviewed in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 80 L. ed. 1033.

It should be here remembered that in its complaint before the Commission (R. p. 33) appellants prayed for an order requiring the railroad defendants to permit appellants to "obtain delivery to them by defendants of said direct shipments at reasonably convenient, safe, and suitable chutes, pens, and ways and be permitted *egress* for removal *from said unloading pens* of such live stock to the nearest public street, via the shortest or most convenient way, to be designated by defendants, without the payment of yardage charges to defendants' agent, The Union Stock Yards and Transit Company of Chicago". This is what the Commission refers to as mere egress.

In the last paragraph on page 180 of the Commission's decision (R. p. 36), the Commission describes the yardage service now rendered on these direct shipments. At pages 181 and 184 of the decision the Commission points out that appellants do not desire any of these stock yard services nor request nor desire that any of their direct shipments be held or placed in holding pens, *but only the right to remove the live stock immediately from such pens to the nearest public street free from payment of a yardage charge*. This demand is one that only could be made upon the rail carrier with whom the shipper has a contract for transportation and delivery of his live stock.

In the three cases before the Secretary of Agriculture above mentioned *no railroad and no shipper* was a party. Each case was one initiated by the Secretary on his own motion to determine reasonable rates for *stock yard services*. No one was before the Secretary in any of the three cases demanding that the railroads afford egress from the unloading pens without stock yard service. Such a complaint could not have been brought before the Secretary, because whatever duty there may be in that respect rests upon the carrier with whom the shipper has a contract of transportation and not upon a stock yard company.

which undoubtedly has the right to charge for all stock yard services rendered by it under the *Packers and Stockyards Act, 1921*.

1. The decision of the Secretary which was the basis of the first case cited by the Commission (B. A. I. Dkt. No. 298, *Secretary of Agriculture v. St. Joseph Stock Yards Company*, exhibit 43 in this record) makes no mention anywhere of direct shipments to packers. Referring to the yardage charges there prescribed by the Secretary, the Secretary said (p. 8):

"The above stated charges, usually designated 'yardage charges' are considered as covering the *warehousing* of the livestock throughout its stay in the stock yards regardless of the duration thereof or the number of changes of ownership which occur, the exception being that on livestock resold in the commission division one-half of the above rates additional is charged."

No distinction was made as to direct shipments to packers, to mere egress, or to anything else of that character. The Secretary prescribed a yardage charge applicable alike to all live stock received at the stock yards for the customary stock yard services of holding, feeding, watering, weighing, etc.

2. The decision of the Secretary which was reviewed in the second case cited by the Commission (B. A. I. Dkt. No. 450, *Secretary of Agriculture v. Denver Union Stock Yard Company*, exhibit 41 in this record) again shows that the question of mere egress was not before the Secretary. That decision contains a mere mention of direct shipments. In paragraph 14, page 4, of the Secretary's decision we find the following statement:

"14. Respondent provides the physical facilities on which the livestock market is conducted, and renders certain services in connection with livestock coming to the stockyard to be marketed, livestock shipped direct to packers, livestock stopped in transit and handled for the railroads, and livestock handled for traders.

Some of the facilities of respondent are used in connection with receiving, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock at its stockyard. For these services respondent charges certain rates."

In paragraph 20, page 5, of the decision there appears the following statement:

"20. For its services in *driving the livestock from the unloading chutes to pens, counting, checking, and keeping a record of each consignment, the furnishing of water, the weighing, and the use of the physical facilities necessary in performing these services, respondent charges the owner or shipper of livestock brought to market the following rates known as yardage charges:*"

It will be noted that no distinction was made as to whether live stock was consigned to a commission man for sale or consigned direct to a local packer. Obviously this is not the service sought by appellants.

By reference to page 79 of Exhibit 41 (which contains the order of the Secretary), it will be noted that the Secretary prescribed the same yardage rates on live stock received and sold at the Denver yards, on live stock sold or contracted in the country to be weighed and delivered at the Denver yards, and on live stock consigned direct to packers and slaughterers. It is perfectly obvious from the decision that, in so far as direct shipments were considered (and they are only mentioned at the points indicated), the Secretary was dealing with the *complete yardage service*. This involved driving the live stock from the unloading chutes to pens, counting, checking, keeping a record of each consignment, furnishing water, weighing, and the use of the physical facilities necessary in performing such services.

The court will search the decision of the Secretary in vain for any discussion of or reference to the question of egress from railroad cars as compared with the full yard-

age service performed under the *Packers and Stockyards Act, 1921*, where the carrier furnishes holding pens, water, feed, and the service of weighing and finally delivering to the purchaser.

3. The decision of the Secretary which was reviewed in the third case cited by the Commission (B. A. I. Dkt. No. 344, *Secretary of Agriculture v. Union Stock Yards Company of Omaha, Ltd.*, exhibit 42 in this record) likewise shows, for the reasons above discussed in connection with the *St. Joseph* and *Denver* cases, that no finding was made by the Secretary with respect to mere egress. The only reference there made to so-called direct shipments appears in paragraph 23, page 7, of the Secretary's decision and reads as follows:

"23. In most instances it is not practicable or convenient for purchasers to receive their livestock direct from the vendors or remove it from the yards immediately after being weighed. When livestock has been weighed and title passed from the original shipper, the nature of its further handling by respondent depends upon the class of purchaser who has acquired it. If the purchaser be a local packer, the livestock is driven by respondent from the scale to holding pens customarily set aside for that purpose, where such livestock is held in the custody of the respondent until the packer takes delivery of it and removes it from the stockyards. Such facilities, known as packer holding pens, are similar in physical characteristics to the so-called commission division where livestock is yarded for the original shipper."

It will be noted that the Secretary there was describing shipments consigned to local packers who apparently desired the stock yards to weigh the shipments, hold them in pens set aside for that purpose, and furnish the ordinary stock yard services. No question as to the right to egress in connection with delivery by a common carrier by railroad appears in that decision. No such issue could have

been before the Secretary because there were no railroads respondents in the proceeding and no shipper was requesting any such order as that contained in appellants' complaint before the Commission.

It will be noted by reference to exhibit 42 that the order prescribed the same yardage charge without any distinction as between directs or other live stock; and that, except as mentioned in the foregoing quotation, direct shipments are not mentioned in the decision. Again it is very evident in this decision that the Secretary asserted no jurisdiction of yardage charges covering mere egress. The question was not before him.

We submit that such an obvious misstatement by the Commission is very prejudicial to appellants because, if the error therein contained is not examined carefully, it might be believed by the court that the Secretary has asserted jurisdiction covering "mere egress" at many public yards. The plain fact is that the Secretary has not done so in any cases, including those cited in the Commission's decision.

On the contrary, the Commission has held in *Allied Packers v. Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, *E. Kahn's Sons Co. v. Baltimore & O. R. Co.*, 192 I. C. C. 705, and *Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, that stock yard charges, in so far as they are assessed for the use of stock yard facilities in effecting delivery of interstate shipments, are charges for transportation within the meaning of that term as defined by section 1 of the Interstate Commerce Act, and that the Commission has jurisdiction to pass upon the legality and reasonableness of such charges.

To the same effect are:

Covington Stock Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73;

Atchison, T. & S. F. R. Co. v. United States, 295 U. S. 193, 79 L. ed. 1382;

Union Stock Yard & T. Co. v. United States, 308 U. S. 213, 84 L. ed. 198;

United States v. Interstate Commerce Commission, 73 F. (2d) 948 (Court of Appeals for the District of Columbia); and

Armour & Co. v. Alton R. Co., 111 F. (2d) 913 (Seventh Circuit).

At any rate this finding of the Commission would seem to have been definitely overruled by this court in the recent case of *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, 85 L. ed. 771, where the court said (pp. 200, 201):

"If use of the terminal facilities for egress to the street after unloading of livestock is a part of transportation, as petitioner alleges, and if this use is a service for which reasonable compensation is justified, it cannot be doubted that this charge, like the unloading charge, is a part of that reasonable transportation rate determination of which is committed to the jurisdiction of the Interstate Commerce Commission."

THE COMMISSION'S REVIEW OF THE CASES HERETOFORE DECIDED BY IT, INVOLVING SUBSTANTIALLY THE SAME QUESTION OF DELIVERY AT PUBLIC STOCK YARDS, IS INACCURATE, INCOMPLETE, OMITTS CERTAIN IMPORTANT DECISIONS, AND FAILS TO STATE FAIRLY THE CONCLUSIONS REACHED BY THE COMMISSION OR THE REASONS THEREFOR.

In paragraph 16 of the complaint in the District Court appellants alleged as error the findings of the Commission with respect to decisions heretofore made by it which, according to the Commission, involved the same question that is presented in this case. The Commission has omitted four important cases (*Keith v. Kentucky Central R. R. Co.*, 1 I. C. C. Rep. 601; *Allied Packers v. Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641; *E. Kahn's Sons Co. v. Baltimore*

E. O. R. Co., 192 I. C. C. 705; and *Adolf Gobel, Inc. v. Baltimore & O. R. Co.*, 200 I. C. C. 606). The summary of the decisions mentioned by the Commission is inaccurate, incomplete, and does not state the conclusions reached by the Commission in the prior decisions or the reasons therefor.

1. The Commission states (decision, pp. 194-195, R. p. 52):

"The first case, after the enactment of section 15 (5), in which the question was raised was *Southwestern Horse & Mule Assn. v. A. T. & S. F. Ry. Co.*, *supra*. There we held that the yardage charges on direct shipments of livestock consigned to a public stockyard for dealers whose places of business were outside the yards were beyond our jurisdiction. The basis for our finding was that transportation to public stockyards ended when the animals were unloaded into suitable pens."

The Commission fails to point out that the service involved in *Southwestern Horse & Mule Asso. v. A. T. & S. F. Ry. Co.*, 129 I. C. C. 730, and that demanded in this case is essentially different. In the former the service performed was a stock yard service for which yardage charges are collected. The service with which the Commission was there dealing is described at pages 733-734 of the decision as follows:

"The stockyards company immediately notifies the outside dealers of the arrival of the shipments, ascertains and records the location of the cars, and unloads the animals into pens adjoining or in the vicinity of the unloading platform, hereinafter called unloading pens, and cares for them as long as they remain in the stockyards. This includes watering facilities always available, sometimes their removal to other open pens, or to covered pens, especially when received during the night or unfavorable weather, and in general the shelter and protection of the animals; also the privilege of sale upon the market while on the premises of the stockyards company."

In other words, the dealers were receiving a *complete stock yard service*, coming within the terms of the *Packers and Stockyards Act, 1921*. While some of the dicta in that decision may have been wrong, the decision was right on the facts. Where the consignee desires a stock yard service (not mere access to the railroad unloading pens for removal of the stock) he is obliged to pay for it, and that is all that was decided in the *Southwestern Horse & Mule Association case*.

2. The Commission dealt with this question during the first year of its existence in *Keith v. Kentucky Central R. R. Co.*, 1 I. C. C. Rep. 601. In that decision the Commission said (p. 603):

"As common carriers of live stock it is the legal duty of the defendants to provide reasonable and proper facilities for receiving on board, and for discharging from their cars, all live stock offered for shipment or brought over their respective roads and their connections to or from the City of Covington, Kentucky, free of charges other than the usual transportation charges. It is not believed that this legal duty and obligation of defendants is fully discharged by receiving on, and discharging from, their cars live stock at a depot, access to which must be purchased."

This decision is omitted from the Commission's summary of decided cases upon this issue.

3. The next case dealing with this question, at a public stock yard after the passage of section 15(5), is entirely omitted in the Commission's summary of decided cases. The Commission's ruling as to the law in that case is in direct conflict with its ruling in the present case. We refer to the decision in *Allied Packers v. Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641. The Commission reexamined the law as declared by it in the *Southwestern Horse & Mule Association case* and stated exactly the construction for which appellants contend. In fact counsel for appellants

could not so well state their own contention as did the Commission in this decision (p. 644):

"The undertaking of the carrier to transport goods necessarily includes the duty of delivering them to the consignee entitled to their possession." *North Penn. Railroad v. Commercial B'k*, 123 U. S. 727. A carrier does not fulfill this obligation to deliver by merely providing a place where goods may be taken out of a car, but it must also provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property. *Covington Stock Yards v. Keith*, 139 U. S. 128; *Norfolk Ry. v. Public Serv. Comm.*, 265 U. S. 70. This service inheres in every transportation.

"With the foregoing statements of the carrier's duties in mind, the conclusion seems inevitable that the stockyards when used to perform the service described were terminal facilities used in the transportation of property, and were freight depots, yards, or grounds used in the delivery of such property, and that the service described is clearly a service in connection with the receipt, delivery, storage, and handling of property transported."

The Commission continued its discussion as to whether section 15 (5) superseded the other provisions of law and of the *Interstate Commerce Act* (161 I. C. C. 646):

"The enactment of the paragraph in question is traceable to our decision in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, wherein we upheld the carriers in their refusal to absorb on shipments of livestock the increases in loading and unloading charges of the public stockyards at Chicago. The history and circumstances leading up to the legislation indicate a purpose only to prohibit the addition of these charges to the line-haul charges on shipments of livestock to and from public stockyards. The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1, or to restrict our jurisdiction."

The Commission next proceeded to examine the question whether the enactment of section 15 (5) limited the jurisdiction of the Commission to the point of unloading of live stock into suitable pens at a public stock yards, or whether the jurisdiction extended to the entire service of delivery to the consignee. Upon this point, the Commission said (pp. 646-647):

"The specific enactment takes precedence over the general enactment only where there is conflict between the two; in the absence of conflict both must be given effect. *A specific provision that with respect to certain shipments certain services shall be included within the term transportation is not in conflict with a general provision which merely includes in the same term a great variety of services with respect to all classes of shipments.* If a particular service is included in the general definition, the failure to include the same service in a specific provision covering certain shipments does not indicate an intention to exclude such services. *The paragraph in question contains no words indicating an intention to repeal or modify section 1 (3), and repeals by implication will not be indulged if there is any other reasonable construction.* *Ruling Case Law*, page 918.

"The primary purpose of the packers and stockyards act, 1921, is to regulate the operations of packers, commission merchants, and stockyard owners in connection with the handling of livestock *consigned for sale at primary markets.* *Stafford v. Wallace*, 258 U. S. 495, 514. That act expressly states that its provisions shall not affect the power or jurisdiction of this commission, nor confer upon the Secretary of Agriculture concurrent power or jurisdiction over any matter within our power or jurisdiction. In considering the question of our jurisdiction over certain service charges collected on shipments of livestock stopped en route for food, water, and rest, we stated in *Strauss & Adler v. New York C. R. Co.*, 153 I. C. C. 609, at page 618:

Bearing in mind that the two acts should be construed in a manner not to create a conflict or overlapping of jurisdictions of the two Federal

agencies entrusted with their enforcement, and recognizing that any doubt which may exist is by the above provision to be resolved in favor of the authority delegated in the older of the two statutes, *we can see nothing in the provisions of the packers and stockyards act, 1921, which in any way limits or affects the jurisdiction of this commission previously conferred to regulate 'all charges * * * for any service rendered or to be rendered in the transportation of passengers or property.'*

"We find that the charges herein assailed in so far as they were assessed for the use of the stockyards facilities in effecting delivery of interstate shipments, were charges for transportation within the meaning of that term as defined in section 1 of the interstate commerce act, and that we have jurisdiction to pass upon the legality and reasonableness of such charges."

In this case the Commission definitely held that *yardage charges* at a public stock yards, assessed for mere delivery, were *transportation charges*. The Commission held that it had jurisdiction over the transportation, not only up to the unloading into suitable pens, but also to the extent of requiring the carrier to furnish "a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property". All that appellants seek here is to have the relief granted by the Commission to the complainant in the *Allied Packers case*.

4. The next case omitted from the Commission's summary of its own decisions involving this same issue at a public stock yards, is *E. Kahn's Sons Co. v. Baltimore & O. R. Co.*, 192 I. C. C. 705. In that decision the Commission said (p. 709):

"The shipping public is entitled to reasonably convenient and safe chutes, pens, and ways for discharging livestock from the cars, and taking them from the carriers' premises without a yardage charge. Not until the livestock can be so removed does the line-haul transportation cease."

This was an unqualified statement by the Commission of the right of the shipper and a complete reaffirmation of the Commission's decision in the *Allied Packers case, supra*. Under that statement of the law appellants are entitled to the relief sought before the Commission in this case.

It may be noted that in the *Kahn* decision the Commission made exactly the distinction for which appellants contend. In that decision the Commission pointed out (p. 706):

"No additional charge is made if the livestock is removed by consignees from the unloading pens before it is weighed, but when it is taken from the unloading pens, is weighed, and is placed in the holding pens, the yardage charges here assailed are made regardless of the length of time the holding pens are occupied."

This is in accordance with the contention of appellants. According to the Commission, it was only in cases where yardage service was desired and requested that it did not have jurisdiction of the delivery charges and that is obviously true for such service after transportation and delivery comes within the *Packers and Stockyards Act, 1921*.

This construction by the Commission was sustained by the United States Circuit Court of Appeals for the District of Columbia in *United States v. Interstate Commerce Commission*, 73 F. (2d) 948. That was a proceeding for a writ of mandamus brought by the Kroger Grocery & Baking Company seeking in substance to require the Commission to reverse its decision in the *Kahn case*. The court refused to issue the writ of mandamus because, in its opinion, it was not necessary for the consignee at Cincinnati to pay any charge in excess of the line haul rate in order to obtain delivery of its live stock. The following quotation from said decision clearly establishes the correctness of our interpretation of the decision in the *Kahn case* (pp. 951-952):

"Undoubtedly, as was said in *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 11 S. Ct. 461, 35 L. ed. 73,

a carrier of live stock has no more right to make a special charge for delivering the stock in and through stock yards provided by itself, *or provided by another corporation*, than a passenger carrier has to make a special charge against a passenger for the use of its passenger depot. The duty of the carrier begins with the delivery of the stock to the carrier to be loaded on its cars, and ends only after the stock is unloaded and delivered or offered to be delivered to the consignee, and the precise terms of the statute (section 15 (5)) impose upon it the obligation to place the stock in suitable pens without extra charge to the consignee. These duties, we think, involve also the duty to furnish all necessary service incident to the carriage, including the ascertainment in some way of the accurate weight of the shipment, since the basis of the transportation charge is the weight of the cattle. . . . *The other services which it renders, that is to say, hoof-weighing and retention when desired, are stock yards services with which the carriers are not concerned.* Based on this conclusion, the Commission reports that the method last above mentioned (f) was available to the consignee, and that under its provisions freight charges could be accurately determined and the cattle delivered to the consignee from the unloading pens *without extra charge or cost to it.* This interpretation finds support in the fact that in the case of other consignees of live stock at Cincinnati, whose relation to the subject-matter was in all respects identical with that of petitioner, delivery of live stock was accomplished precisely in the above-stated manner."

5. The Commission also omitted any reference to its decision in *Adolf Gobel, Inc. v. Baltimore & O. R. Co.*, 200 I. C. C. 606. In that case no charge was made if a mere egress from the public yards was all that was sought by the consignee, but a charge was made if the consignee desired and received a yardage service. Upon this factual situation the Commission dismissed the complaint, and its decision was correct.

6. The Commission next (p. 195 of decision, R. p. 53) places its construction upon the decision of the Supreme Court in the *Hygrade case* (*Atchison, T. & S.F. R. Co. v. United States*, 295 U. S. 193, 79 L. ed. 1382). The Commission says that "the court and we have interpreted that decision as holding that transportation of direct shipments of live stock to a public stockyard terminates at the unloading pens" and cites *Denver Union Stock Yard Co. v. United States*, 304 U. S. 470, 82 L. ed. 1469, in support of the doctrine adopted by "the court and we".

It should be noted that in the later case of *Union Stock Yard & T. Co. v. United States*, 308 U. S. 213, 84 L. ed. 198, at page 219, the court cites the *Denver Union Stock Yard Company case* directly to the contrary and in support of the doctrine of the *Covington Stock Yards case*, 139 U. S. 128, 35 L. ed. 73 (which the Commission here overrules).

In the *Union Stock Yard & T. Co. case*, *supra*, at page 219, the court said:

"Without the aid of these statutes the transportation of livestock by rail was held to begin with its delivery to the carrier for loading onto its cars, and to end only after unloading for delivery or tender to the consignee at the place of destination. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 136, 35 L. ed. 73, 76, 11 S. Ct. 461 * * * *Denver Union Stock Yard Co. v. United States*, 304 U. S. 470, 82 L. ed. 1469."

That this principle of law applies to the transportation of live stock not only at common law, but under the *Inter-state Commerce Act*, was recently held by the Circuit Court of Appeals for the seventh circuit in *Armour & Co. v. Alton R. Co.*, 111 F. (2d) 913, 916, decided April 4, 1940. In that decision the Circuit Court of Appeals for this circuit (Judges Sparks, Treanor, and Kernier) said:

"In passing we add that the transportation of livestock by rail begins with its delivery to the carrier for loading at point of origin, and ends after unloading

for delivery of tender to the consignee at the place of destination. This was the rule at the common law. *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 136, 11 S. Ct. 461, 35 L. Ed. 73. *It is the rule under the Interstate Commerce Act.* [See *Union Stock Yard & Transit Co. v. United States*, *supra*. No magic is needed to compel the thought that the mere privilege of immediate removal from the unloading pens, 'a mere way out to the public highways', is incidental to and part of the delivery. *Atchison, Topeka & Santa Fe Railway Co. v. United States*, 295 U. S. 193, 201, 55 S. Ct. 748, 79 L. Ed. 1382; See also dissent therein, 295 U. S., at page 203, 55 S. Ct., at page 753, 79 L. Ed. 1382."

An examination of all the cases dealing with this issue decided by the Commission shows that, with the exception of the present case, the Commission has uniformly held that where a stock yard service at a public stock yards is requested by and is performed for the consignee, the shipper must pay, in addition to the railroad rate, the charge for stock yard services contained in tariffs filed with the Secretary of Agriculture; but that where, as here, nothing is sought except mere access to the carrier's unloading chutes for immediate removal of the live stock from the railroad cars, no charge may be made in addition to the line haul rate to the unloading chutes.

It will also be noted that the decision of the Commission in the present case is in direct conflict with the recent decisions of this court and the recent decision of the Circuit Court of Appeals for this circuit.

THE COMMISSION ERRED IN FAILING TO FIND (IN ACCORDANCE WITH THE UNDISPUTED EVIDENCE) THAT EGRESS WITHOUT A YARDAGE CHARGE IS AFFORDED BY THE RAILROAD DEFENDANTS AT MANY IMPORTANT PUBLIC STOCK YARDS.

It was alleged in paragraph 20 of the complaint in the District Court (R. p. 14) that the Commission erred in failing to include in its report any reference to and in

failing to give any weight to evidence offered by appellants; which shows that delivery of direct shipments of live stock to the consignee, without charge in excess of the published tariff rate, where yardage service is not required or requested by the consignee, is provided at many important stock yards which are served by the railroad defendants; and in failing to find that in one instance of this kind the practice was prescribed by the Commission and in another instance is in accordance with a finding of the Commission.

The fact that egress without charge for direct shipments of live stock is permitted at many important stock yards in the United States, and has been required by the Commission, is not mentioned in the decision of the Commission, although it was the subject of substantial testimony on the part of appellants. In this connection, we call attention to pages 105-136 of the transcript (R. pp. 189-207, exhibits 5-18, inclusive). This evidence shows briefly the following situation as to various public stock yards.

Union Stock Yards Company of Baltimore, Md. Egress for direct shipments is allowed without charge. Both the Baltimore & Ohio Railroad and the Pennsylvania Railroad (defendants before the Commission) reach this stock yards. (Exhibit 5, R. pp. 194, 195.)

The Buffalo Stock Yards of East Buffalo, N. Y. Egress from the unloading pens is permitted without charge at this stock yards. Such egress is in conformity with the decision and order of the Commission in *Allied Packers v. Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641. (Exhibit 6, R. pp. 197, 198.)

Union Stock Yard Company of New Jersey, Benning, D. C. Egress of live stock from unloading pens is permitted without charge in addition to the transportation rate. (Exhibit 7, R. p. 198.) *Adolph Gobel, Inc. v. Baltimore & O. R. Co.*, 200 I. C. C. 606, concerned ship-

ments delivered to the stock yards at Benning. The Commission there pointed out that the shipper could obtain delivery of live stock at the line haul rate and without yardage charges if it desired delivery at the unloading pens, but that the stock yard company had performed services for the shipper in addition to mere egress which consisted of holding, feeding, watering, etc.

The Cincinnati Union Stock Yard Company, Cincinnati, Ohio. Egress of direct shipments where no stock yard service is desired is here allowed without charge above the transportation rate. (Exhibit 8, R. p. 199.) This was so found by the Commission in *E. Kahn's Sons Co. v. Baltimore & O. R. Co.*, 192 I. C. C. 705. The Commission there stated (p. 706):

"No additional charge is made if the livestock is removed by consignees from the unloading pens before it is weighed, but when it is taken from the unloading pens, is weighed, and is placed in the holding pens, the yardage charges here assailed are made regardless of the length of time the holding pens are occupied."

It was because this egress was allowed that the complaint was dismissed. See also *United States v. Interstate Commerce Commission*, 73 F. (2d) 948. Upon the question whether the consignee was entitled to egress, the Commission said in the *Kahn* case (p. 709), contrary to its holding in the present case:

"The shipping public is entitled to reasonably convenient and safe chutes, pens, and ways for discharging livestock from the cars, and taking them from the carriers' premises without a yardage charge. Not until the livestock can be so removed does the line-haul transportation cease."

This ruling of the Commission was sustained by the United States Circuit Court of Appeals in the case last cited.

The defendants before the Commission who deliver live

stock at the Cincinnati Union Stock Yards are The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Pennsylvania Railroad Company, and the Chicago, Indianapolis and Louisville Railway Company.

The Cleveland Union Stock Yards Company, Cleveland, Ohio. Egress for direct shipments is permitted here without assessment of charges above the line haul rate. Swift and Company receives such shipments from railroad defendants at its Cleveland packing plant. (Exhibit 9, R. pp. 199, 200.) The railroad defendants before the Commission who make deliveries at Cleveland Union Stock Yards are the Pennsylvania Railroad, Baltimore & Ohio Railroad, and certain others.

Detroit Stock Yards, Detroit, Mich. No charge other than the line haul rate is made in connection with egress of direct shipments of live stock at the Detroit Stock Yards. Live stock is delivered at this public stock yards by the New York Central Railroad, a defendant in the complaint before the Commission. (Exhibit 10, R. p. 200.)

The Belt Railroad and Stock Yards Company of Indianapolis, Ind. Direct shipments of live stock are delivered through this stock yards at Indianapolis with no charge over and above the line haul rate, provided the live stock is removed from the carrier's cars or unloading pens immediately upon their arrival. Certain of the railroad defendants before the Commission, including the Baltimore & Ohio Railroad, Chicago, Indianapolis and Louisville Railway, and the Pennsylvania Railroad, deliver shipments to the Indianapolis Stock Yards under this arrangement. (Exhibit 11, R. p. 201.)

Los Angeles Union Stock Yards Company, Los Angeles, Calif. At this stock yards, if possession of the live stock is taken promptly at the unloading chutes, there is no charge in addition to the line haul rate. The Atchison, Topeka and Santa Fe Railway, a railroad defendant before

the Commission in this case, makes its delivery through said stock yards at Los Angeles. (Exhibit 12, R. p. 202.)

The Bourbon Stock Yard Company, Inc., Louisville, Ky.

This is the public stock yard through which the line haul carriers, including certain railroad defendants before the Commission such as the Chicago, Indianapolis and Louisville Railway, Cleveland, Cincinnati, Chicago and St. Louis Railway, and the Pennsylvania Railroad, generally make their deliveries at Louisville, Ky. No charge is made if delivery of live stock is made immediately to consignees at the unloading chutes or pens. (Exhibit 13, R. pp. 204, 205.)

Muncie National Stock Yard Company, Inc., Muncie, Ind.

Here again no charge, in addition to the line haul rate, is incurred where immediate delivery is made to consignee at the unloading chutes. Certain of the railroad defendants before the Commission, including the Chesapeake and Ohio Railway, Cleveland, Cincinnati, Chicago and St. Louis Railway, and Pennsylvania Railroad, deliver their shipments of live stock at this public stock yards under this arrangement. (Exhibit 14, R. p. 205.)

West Philadelphia Stock Yards Company, Philadelphia, Pa.

No charge, in addition to the line haul rate, is made for direct shipments delivered at this stock yards when consignee takes immediate possession of the live stock upon arrival at the unloading chute. Certain of the railroad defendants before the Commission, including the Baltimore & Ohio Railroad and Pennsylvania Railroad, make deliveries to the unloading pens at these yards without extra charge. (Exhibit 15, R. pp. 205, 206.)

Pittsburgh Joint Stock Yards Company, Pittsburgh, Pa.

Only the line haul transportation charge is assessed on live stock delivered at this stock yards in Pittsburgh when

the consignee takes immediate possession of the live stock upon arrival at the unloading chutes. Delivery is made at this stock yards by certain of the railroad defendants before the Commission, including the Pennsylvania Railroad and the Baltimore & Ohio Railroad. (Exhibit 16, R. pp. 206, 207.)

The Wichita Union Stock Yards Company, Wichita, Kans. No charge above the line haul transportation rate is made for delivery of live stock through this stock yard if the consignee is prepared to take immediate possession at the unloading pens. The Atchison, Topeka and Santa Fe Railway and the Chicago, Rock Island and Pacific Railway, railroad defendants in the case before the Commission, deliver live stock to this stock yards. (Exhibit 17, R. p. 207.)

Since the decision of the Commission in the present proceeding (April 8, 1940) a later decision of the Commission shows that there are several eastern stock yards at which egress is allowed without charge above the published tariff rate and is in fact paid for by the line haul railroads. We refer to the decision of the Commission in *Status of Public Stockyard Companies*, 245 I. C. C. 241 (April 7, 1941). The Commission there states that the Jersey City Stock Yards operates a *public* stockyards in Jersey City, N. J., and then points out, at page 259:

"The stockyard company also notifies consignees of arrival of shipments, preserves the identity of each consignment, *delivers stock to consignee* or on floating equipment, obtains receipts therefor, collects transportation charges, handles loss and damage claims, assumes all responsibility therefor, weighs stock if requested, and performs all clerical work in connection with such services. It also orders cars, checks weights, routes shipments, and prepares freight bills on pre-paid shipments. For these services the railroads pay the stockyard company \$2.75 per car, except on outbound shipments. This charge is published in tariffs on file with us."

This practice was not disapproved by the Commission in said decision.

Concerning the West Philadelphia Stock Yard Company which operates the only public stock yard in Philadelphia, Pa., the Commission said in the same decision, at page 250:

"The stockyard company also notifies the railroads of the arrival of the stock, weighs it, collects transportation charges, and *delivers* the stock to consignees at various points in the building. The stockyard company receives an additional \$1.00 per car from the railroads for performing these services."

This practice was not disapproved by the Commission.

The Commission points out, at page 268 of said decision, that the Union Stock Yard & Market Company, Inc., is the only public stock yards in New York, N. Y. The decision of the Commission further states that this stock yard company:

"agrees, among other things, to provide suitable, adequate, and proper accommodations for the unloading, weighing, care, handling, and *delivering of livestock to consignees*, to collect transportation charges and remit them to the New York Central, and to perform all necessary services in connection with accounting and handling of claims, at compensation to be based upon the reasonable cost thereof plus a reasonable percentage for supervision and profit. The present charge of the New York Stock Yards Company for performing these services is \$8.47 per car. This charge is published as an allowance in tariffs of the New York Central on file with us."

This practice was not disapproved by the Commission.

The importance of this evidence goes to the following points:

1. There is no universal rule in this respect.
2. There has been no interpretation of section 15(5) by the packers as shown by "their affirmative action."
3. It tends to show error in the finding of the Com-

mission (decision p. 188, R. p. 45) where the Commission says that the carrier defendants "have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens."

As to point 1, it will not only be noted that the evidence shows that the practices of the railroads are not uniform, but that their practice at the Cincinnati Stock Yards is in accordance with the findings of the Commission in *E. Kahn's Sons Co. v. Baltimore & O. R. Co.*, 192 I. C. C. 705, and that egress without extra charge was specifically required at the Buffalo Stock Yards by the order of the Commission in *Allied Packers v. Atchison, T. & S. F. Ry. Co.*, 161 N. C. C. 641.

RAILROAD RATES TO YARDS WHERE EGRESS IS ALLOWED SAME AS TO
CHICAGO, WHERE IT IS DENIED.

The question whether the rates cover the service is believed by appellants to be immaterial because, if the rates do not cover the service, they can be increased sufficiently to do so or a specific added charge made for egress on directs. It will be noted, however, that certain of these stock public yards at which the railroad defendants in this case deliver live stock, and have arranged for egress without charge, are in the immediate freight territory in which Chicago is located, that known as central territory, including the states of Illinois, Indiana, and Ohio, border points such as Louisville, and western parts of New York and Pennsylvania. Within this territory are the following stock yards where egress is permitted without charge:

Buffalo Stock Yards, East Buffalo, N. Y.
Cincinnati Union Stock Yards, Cincinnati, Ohio.
Cleveland Union Stock Yards, Cleveland, Ohio.
Detroit Stock Yards, Detroit, Mich.
Indianapolis Stock Yards, Indianapolis, Ind.
Bourbon Stock Yards, Louisville, Ky.
Muncie National Stock Yards, Muncie, Ind.
Pittsburgh Joint Stock Yards, Pittsburgh, Pa.

In *Eastern Livestock Cases of 1926*, 165 I. C. C. 277, at page 313, the Commission prescribed a mileage scale of live stock rates within central territory. These rates are the same within central territory regardless of the destination. That is to say, the rates are, mile for mile, the same to Chicago from any origin in central territory as they are to Buffalo, Cincinnati, Cleveland, Detroit, Indianapolis, Louisville, Muncie, and Pittsburgh. The rates so prescribed by the Commission are still in effect except for a flat percentage increase in all freight rates allowed by the Commission in *Fifteen Percent Case*, 1937-1938, 226 I. C. C. 41. If exactly the same freight rates for any given number of miles to Buffalo, Cincinnati, Cleveland, Detroit, Indianapolis, Louisville, Muncie, and Pittsburgh are sufficient to permit egress without extra charge above the line haul rate, it is difficult to understand why they should be inadequate for that purpose when applied to Chicago.

The decision of the Commission in *Eastern Live Stock cases, supra*, fixing the live stock rates to Chicago and the other points mentioned, makes no finding as to whether the rates do or do not include egress at the stock yards.

EXHIBIT 47 IN RECORD BEFORE COMMISSION.

An Agreement, made and entered into at the City of Jersey City, State of New Jersey, this 15th day of January, A. D. one thousand eight hundred and ninety-two, by and between THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY (hereinafter called the "New Jersey Company") as party of the first part, and PHILIP D. ARMOUR, JONATHAN O. ARMOUR, PHILIP D. ARMOUR, JUNR., and GEORGE H. WEBSTER, individually and as co-partners, composing the firm of Armour & Company; NELSON MORRIS, FRANK E. VOGEL and EDWARD MORRIS, individually and as co-partners, composing the firm of Nelson Morris & Company, and GUSTAVUS F. SWIFT, EDWIN C. SWIFT, LOUIS F. SWIFT and EDWARD F. SWIFT, all of the City of Chicago, State of Illinois, parties of the second part.

WHEREAS the party of the first part, The Chicago Junction Railways and Union Stock Yards Company, is a Corporation organized and existing under the laws of the State of New Jersey, United States of America, with an authorized capital stock of thirteen million dollars (\$13,000,000) divided into sixty-five thousand shares of six per cent. preferred stock of the par value of one hundred dollars (\$100) each, namely \$6,500,000, and sixty-five thousand shares of common or general stock of the par value of one hundred dollars (\$100) each, namely \$6,500,000, and of which said capital stock shares amounting in the aggregate to over the sum of \$12,400,000 have been duly issued and are now outstanding; and which said Company was formed and incorporated for the purpose, among other things, of purchasing and holding shares of the capital stock of the Union Stock Yard and Transit

Company (hereinafter called the "Transit Company"); and

WHEREAS the said Transit Company was incorporated in the year 1865 under the laws of the State of Illinois, with power to locate, construct and maintain, at or in proximity to the City of Chicago, yards, inclosures, buildings, railway lines &c., for the conduct or accommodation of the business of a General Union Stock Yard for cattle and live stock; and

WHEREAS the said Transit Company in or about the year 1865 constructed and has since maintained in said City of Chicago large yards and extensive buildings, plant and railways necessary for the conduct of said stock yards business, which premises are owned by said Company, and represent the investment of its capital stock of \$13,200,000 divided into 132,000 shares of the par value of \$100 each; and

WHEREAS the said New Jersey Company purchased and acquired about 129,770 shares of said capital stock of said Transit Company, for which shares the said New Jersey Company paid the sum of over \$22,000,000, partly in cash and partly in its bonds, which said bonds are part of a total issue of ten million dollars (\$10,000,000), due July 1st, 1915, with interest at the rate of 5 per cent. per annum, payable semi-annually, and are secured by a deed of trust pledging as collateral security for their payment 120,000 of the shares of said Transit Company; and

WHEREAS the principal revenue and income of said Transit Company are derived from yardage charges on cattle and live stock, and from the sale of feed for such cattle and live stock, and which revenue and income from such yardage and charges have annually increased since the establishment of the stock yards of said Transit Company, and now amount to about the sum of \$2,000,000 per annum; and

WHEREAS the market and demand for cattle and live stock at the yards of the Transit Company in the City of Chicago arise from and by reason of the presence of many large slaughtering, packing and canning plants and establishments on premises in the immediate neighborhood or contiguous to said stock yards, in the part of said city known as Packingtown, and the largest and the principal of such slaughtering, packing and canning plants and establishments are owned or controlled by the parties of the second part hereto, whose purchases of cattle and live stock at said yards have for several years last past represented and constituted about fifty-five (55) per cent. of the demand and market for cattle at the said yards; and

WHEREAS said co-partnership of Nelson Morris & Company are the owners and holders of all of the shares of the capital stock of the Fairbank Canning Company and said Gustavus F. Swift, Edwin C. Swift, Louis F. Swift and Edward F. Swift are the owners and holders of a majority of the shares of the capital stock of Swift and Company, both of said corporations being organized under the laws of the State of Illinois; and

WHEREAS the said parties of the second part have purchased and acquired certain premises at Packingtown aforesaid, known as the "Central Stock Yards," near the yards of the said Transit Company, and have constructed and erected on said premises various platforms, pens, sheds, railway sidings, &c., for the purpose of receiving and distributing among themselves any and all cattle and live stock owned or purchased by them outside of the City of Chicago, or directly consigned to them or either of them, and thereby avoiding the payment of any yardage charges to the said Transit Company, and have demanded that the said Transit Company permit the use of their railway tracks for the transportation and delivery of such cattle and live stock to their said Central Stock Yards, and said Armour & Company, Swift and Company, and

Nelson Morris & Company have recently commenced three several suits in equity in the Circuit Court of Cook County, State of Illinois, against the said Transit Company, claiming and demanding as relief that the said Court by order and decree compel the said Transit Company to afford facilities over its railways for the transportation and delivery of any and all cattle and live stock belonging or consigned to them or any of them or to said Central Stock Yards without the payment of the usual yardage charges thereon as heretofore paid by them and collected by said Transit Company; and

• WHEREAS if such parties succeed in such litigation and discontinue purchasing live stock at such yards of the Transit Company to the extent of the capacity of said Central Stock Yards, the demand and market in Chicago for live stock would be diminished to the extent of over 500,000 cattle per annum, thus increasing *pro tanto* the demand and market in other States, viz., at Kansas City, at Omaha and elsewhere, to the great injury and diminution of the market at Chicago, and to the loss and damage of said Transit Company's income and yardage to the extent of over \$100,000 per annum; and

WHEREAS the said New Jersey Company desires to secure and provide, for the use of the said Transit Company, premises located near the City of Chicago and suitable for the business of stock yards in case it shall hereafter become necessary to remove thereto the said yards of the Transit Company by reason or because of the growth of the City of Chicago or municipal ordinances or legislation or other causes; and

WHEREAS the said parties of the second part have caused to be purchased and now own at Tolleston, in the State of Indiana, and within about ten miles of the City of Chicago, a tract of land consisting of about four thousand acres which is believed to be the most suitable location within such distance for the purpose mentioned, and which they

have acquired for the purposes and with the intention of removing their entire slaughtering, packing and canning plants and establishments from said Packingt^{own}, in the City of Chicago, to the said premises at Tolleston, State of Indiana, and of inducing other slaughtering, packing and canning concerns to likewise remove their plants and establishments to said Tolleston property, and with the intention of locating and establishing in the State of Indiana, stock yards for the use of all parties locating on or in proximity to said premises, and have entered into negotiations and contracts with one or more railway companies to furnish the required facilities for the transportation to and from said property of cattle, live stock, &c.; and

WHEREAS the removal from the City of Chicago to Tolleston aforesaid of the businesses and slaughtering, packing and canning plants and establishments so owned or controlled by said parties of the second part and said Swift and Company and the Fairbank Canning Company would diminish the demand and market for cattle and live stock at Chicago, and shipments thereof to the yards of said Transit Company, so as to result in a large decrease of its business, revenue and income, and so as to remove from said City of Chicago, State of Illinois, into another State, about one-half of the present demand and market at Chicago for live stock, to the great injury generally of the City of Chicago, and particularly of the business of said Transit Company; and

WHEREAS the said parties of the second part have consented to compromise their claims and demands against the said Transit Company as set forth and alleged in said three suits; also to transfer, surrender and convey to said Transit Company the said Central Stock Yards together with the railway sidings, platforms, pens, sheds, fixtures and appliances thereon, and to release and convey thereto all covenants or easements claimed and alleged in the said

suits; also to continue for the period of fifteen years from the first day of July, 1891, to conduct their several businesses at Chicago as aforesaid, and to purchase cattle and live stock at said yards of the Transit Company, and pay yardage charges upon cattle and live stock purchased and owned by or consigned to them; also to transfer and convey to said New Jersey Company one thousand acres of said tract of land at Toileston, in the State of Indiana, and also to further covenant and agree as hereinafter particularly set forth, upon the terms and for the considerations below stated:

NOW THIS AGREEMENT WITNESSETH that the parties hereto for and in consideration of the premises and of the covenants and agreements herein after set forth, have covenanted and agreed and do hereby covenant and agree to and with each other as follows:

FIRST.—The said parties of the second part covenant and agree, upon demand of the said New Jersey Company, to cause to be conveyed to said Transit Company, all and singular the premises known as the Central Stock Yards, including any and all railway sidings, platforms, pens, sheds, fixtures and appliances whatsoever, together with all covenants, rights, privileges and easements thereunto in any way appertaining, and including the covenants, rights, privileges and easements mentioned, referred to or set forth in the bills of complaint in said suits so pending in the Circuit Court of Cook County, Illinois. Such conveyance of said premises to said Transit Company shall be for the sum or consideration of one dollar, lawful money of the United States of America, payable by said Transit Company, and shall be in fee simple free and clear of all liens and incumbrances whatsoever.

SECOND.—The said parties of the second part covenant and agree that they will cause each and all of the said suits to be discontinued and abandoned at their own proper cost and expense, and that they will not, nor will any of

them, at any time during the continuance of this agreement, make or set up against the said Transit Company the claims and demands alleged in the bills of complaint in said suits, nor directly or indirectly bring or cause to be brought any similar suits at law or in equity making or alleging any claims or demands similar to those set forth in said bills of complaint.

THIRD.—The said parties of the second part further covenant and agree to convey or cause to be conveyed unto the said New Jersey Company, its nominees or assigns, one thousand acres of said land at Tolleston in fee simple free from all liens or incumbrances whatsoever, such land being more particularly described as follows:

“A tract of land containing one thousand (1,000) acres more or less, situated in the County of Lake and State of Indiana, being a part of sections two (2) and three (3) in township thirty-six (36) north, range eight (8) west and a part of sections thirty-four (34) and thirty-five (35) in township thirty-seven (37) north, range eight (8) west, described as follows, to wit: Beginning at a point on the south line of said section three (3) nine hundred seventy-eight and five-tenths (978.5) feet east of the southwest corner of said section three (3), and running thence east along the south line of said section, a distance of forty-two hundred eighty-three and one-tenth (4283.1) feet to the southeast corner of said section; thence north along the east line of said section three (3), seventeen hundred and eighty-eight (1788.0) feet; thence east $0^{\circ} 56'$ south (true bearing as governed by true meridian monumented at southwest corner of section four (4), township thirty-six (36) north, range (8) west seven hundred fifty-six and eight-tenths (756.8) feet; thence north $0^{\circ} 56'$ east (true bearing as governed by said true meridian) seventy hundred twenty-three and four-tenths (7023.4) feet to the shore of Lake Michigan; thence westwardly along said shore to a point north $0^{\circ} 56'$ east (true bearing as governed by said true meridian) from point of beginning; thence south $0^{\circ} 56'$ west (true bearing as governed by said true meridian) a distance of forty-one hundred twenty-six and

four-tenths (4126.4) feet to the north line of said section three (3), thence westwardly along said north line eleven hundred and fifty-five (1155.0) feet to the northwest corner of said section three (3); thence southwardly along the west line of said section three (3), twelve hundred forty-eight and one-tenth (1248.1) feet to a stone monument marking the southeast corner of Lake Shore and Michigan Southern Railroad Company's land; thence eastwardly parallel to the north line of said section three (3), eleven hundred and ten (1110.0) feet to a point north $0^{\circ} 56'$ east (true bearing as governed by said true meridian) from point of beginning; thence south $0^{\circ} 56'$ west (true bearing as governed by said true meridian) thirty-six hundred fifty-one and two-tenths (3651.2) feet to point of beginning, excepting the right of way across said premises of the Lake Shore & Michigan Southern Railway Company and of the Baltimore & Ohio Railroad Company."

FOURTH.—The parties of the second part further covenant and agree, that, during the period of fifteen years from the first day of July, 1891, unless the Transit Company's yards are during that time removed from the City of Chicago, and in such event, then until such removal within said period, they and said Swift and Company and the Fairbank Canning Company shall and will continue their several businesses and slaughtering, packing or canning plants and establishments at Packingtown aforesaid and covenant, undertake and guarantee that any and all cattle and live stock slaughtered by them or any of them, or said companies or either of them, on their said premises or within two hundred miles of the City of Chicago, during such period, shall pass through and use said yards, and pay the usual yardage and charges therefor.

FIFTH.—The said parties of the second part further covenant, undertake and guarantee that the said Transit Company shall receive and collect from its yardage and charges on cattle and live stock, owned or purchased by or consigned to said parties of the second part and said

companies, at said yards, the aggregate sum of at least two million dollars (\$2,000,000) within six years from said 1st of July, 1891. If, at the expiration of said six years, the said yardage and charges on such cattle and live stock shall not have equalled the said sum of \$2,000,000, then the said parties of the second part covenant and agree that they will immediately and on demand pay to the said New Jersey Company whatever sum may be necessary to make up the said \$2,000,000.

SIXTH.—The said parties of the second part further covenant and agree that during the term of fifteen years from the said 1st of July, 1891, they will not themselves use, or permit others to use, any portion of said remaining three thousand acres at Tolleston for slaughtering, canning or packing-house purposes, and that during said term no portion of said three thousand acres shall be sold or conveyed without there being inserted in the deeds or grants thereof a condition or restriction against the use of the premises for any such purposes during said term unless the said New Jersey Company shall in writing expressly waive such condition in each and every instance. The said parties of the second part shall give grant and convey to said New Jersey Company its nominees, or assigns, any and all reasonable easements and connections over said remaining three thousand acres, in order to enable the said one thousand acres or any part thereof to be connected by road or railway with Lake Michigan or any railways, canals, roads or highways in the neighborhood of said one thousand acres, and the said New Jersey Company, its nominees or assigns, as owners of the said one thousand acres, shall likewise grant to the parties of the second part, their nominees or assigns, such easements and connections over the said one thousand acres as may be reasonably necessary to connect any part of the said three thousand acres with said one thousand acres or with Lake Michigan, or any railways, canals, roads or highways in the neighborhood.

SEVENTH.—The said parties of the second part further covenant and agree that during the term of fifteen years from the said 1st of July, 1891, they, and said Swift and Company and said Fairbank Canning Company will aid, assist and co-operate with said Transit Company and said New Jersey Company in all lawful ways in furthering and promoting the business and interests of said Transit Company, and likewise covenant and agree that during said period they and said Swift and Company and said Fairbank Canning Company, will not, nor will any of them in said City of Chicago, or at any place within two hundred miles thereof, establish or carry on, directly or indirectly, or be concerned or interested in any manner or form whatsoever in any stock yards for the receipt and use of their own live stock.

EIGHTH.—The said parties of the second part further covenant and agree that as long as the said Transit Company shall conduct the business of a general stock yard for cattle and live stock at the City of Chicago, State of Illinois, on its premises aforesaid, or any part thereof, they and said Swift and Company and said Fairbank Canning Company will not, nor will any of them, within the limits of the City of Chicago, establish or carry on, directly or indirectly, or be concerned or interested in any manner or form whatsoever in any stock yards in said city for the receipt and use of their own live stock.

NINTH.—The said parties of the second part further covenant and agree that they will do or cause to be done, execute or cause to be executed, any and all such further acts, deeds and instruments as may be necessary for the more effectually carrying out this agreement according to its true intent and purpose and that may be reasonably advised or required by said New Jersey Company or its counsel. The covenants herein recited on the part of the parties of the second part are joint and several, and said parties and each of them, jointly and severally, guarantee

the due performance of all the obligations and conditions hereof by the other parties of the second part, and shall be jointly and severally responsible in damages to the said Transit Company or said New Jersey Company, their successors or assigns, for any and all breach or breaches thereof, by one or more of said parties of the second part.

TENTH.—The party of the first part hereto, said New Jersey Company, covenants and agrees to execute, issue and deliver to said parties of the second part three million dollars (\$3,000,000) of income bonds, dated July 1st, 1891, and payable as to principal on or before the 1st day of July, 1907, with interest payable semi-annually on the first days of January and July of each year at such rate not exceeding five per cent. per annum as the net surplus income of said company shall suffice to pay, as hereinafter provided, beginning from said 1st of July, 1891, the first semi-annual payment of interest to accrue as of the 1st day of January, 1892. The said income bonds shall, among other things, provide that the interest thereon shall accrue and be payable in each and every year only out of the net income of said New Jersey Company if sufficient, after paying its present fixed charges on its issue of \$10,000,000 Collateral Trust Bonds, its current expenses, and the six per cent. cumulative dividends on \$6,500,000 of its Preferred Stock, but before its common or general stock shall receive or be paid or entitled to any dividend. The interest on said income bonds shall be payable in each year only out of net income of such year as aforesaid, and shall not be cumulative; that is to say the income of one year shall not be used to provide for any previous deficiency nor to provide for any future payments. Said bonds, however, shall contain the provision that in each and every year the party of the first part shall, after paying out of its net income its said present fixed charges, current expenses and six per cent. dividend on said preferred stock, set aside semi-annually, beginning on the 1st day of July, 1892, the

sum of \$100,000 before any dividend is paid on or set aside for the common stock, provided the surplus net income of the Company shall be sufficient so to do; or, if insufficient, then such amount of surplus net income, if any, as may have been collected or received; but this provision shall not be cumulative. The said sum of \$100,000 semi-annually or such lesser sum as such surplus net income may represent shall be used and applied, if sufficient (first) to pay or provide interest for the current half year on such income bonds then outstanding; and (secondly) the balance, if any, of such sum shall be used for the purpose of redeeming the said income bonds at par, to be drawn by lot in the usual way, or, at the option of said New Jersey Company, instead of drawing the same by lot, such surplus may be used to purchase and cancel said bonds. The principal and interest on said income bonds shall be payable at the office or agency of the New Jersey Company in the City of New York, and the Central Trust Company of New York shall be the Trustee of said issue of bonds. The said income bonds shall further provide that no new bonds ranking prior to or equal to said income bonds shall be issued by said party of the first part without the consent of the holders of seventy-five per cent. of the said income bonds then outstanding. The form and provisions of said income bonds shall be such as may be agreed upon by the counsel for the respective parties hereto, and such bonds shall be lithographed or engraved, executed and delivered with all convenient speed.

ELEVENTH.—The party of the first part shall have the right and option to deliver to said parties of the second part shares of its said common stock, at par, in lieu of any or all of said income bonds, less the coupons for interest past due at the time of making such delivery, which coupons shall be paid to the parties of the second part. Should such income bonds be delivered prior to the first day of May, 1892, then and in that event said New Jersey Company shall have the right and option until such last mentioned

date, to exchange any of ~~its~~ said common stock at par for any or all of said bonds ~~with~~ their coupons not then due.

TWELFTH.—The parties of the second part covenant and agree that they will hold and not alienate, dispose of or transfer any of said income bonds, for the period of eighteen months from the date hereof, and will at all times during the period of five years from the date hereof, hold and own at least \$1,000,000 of said bonds, and not alienate, dispose of or transfer said \$1,000,000 of bonds during said term of five years. If, however, any shares of stock be delivered in lieu of or in exchange for bonds as aforesaid then and in that event, the said parties of the second part shall, at all times during said term of five years, own and hold, and not alienate, dispose of or transfer \$1,000,000 par value of such stock, if so much, be delivered in lieu of or in exchange for bonds, but if insufficient, then all shares of stock so delivered and sufficient bonds to make the total holding \$1,000,000 par value in bonds and stock shall be held for said period of five years. If, however, more than \$1,000,000 of stock be so delivered or exchanged, then and in that event, the parties of the second part shall be at liberty to sell and dispose of any surplus of stock over \$1,000,000 par value as and when they may desire so to do.

THIRTEENTH.—Should there be any delay in the execution and delivery of said income bonds for any cause whatsoever, any and all amounts due and payable on said income bonds, whether for interest or redemption purposes, shall in the meantime be deposited with the Central Trust Company of New York, to be held as Trustee under this agreement.

FOURTEENTH.—Any and all previous agreements heretofore executed and now existing between the parties hereto are hereby cancelled and annulled.

IN WITNESS WHEREOF, the said party of the first part has, by resolution of its Board of Directors, duly caused these presents to be signed in its name by its Vice-President, and its seal to be attested by its Secretary, and the parties

of the second part have affixed their hands and seals—
these presents being executed in duplicate.

THE CHICAGO JUNCTION RAILWAYS
AND UNION STOCK YARDS COM-
PANY,

By JOHN QUINCY ADAMS,
Vice-President.

Signed in the presence of:

WM. D. GUTHRIE,
29 Nassau Street,
New York City.

Attest:

WM. C. LANE,
Secretary.

ARMOUR & Co.,
JONATHAN O. ARMOUR,
GUSTAVUS F. SWIFT,
EDWIN C. SWIFT,
NELSON MORRIS & Co.,
By A. H. VEEDER,
Attorney.

PHILIP D. ARMOUR, JR.,
GEORGE H. WEBSTER,
NELSON MORRIS & Co.,
EDWARD MORRIS,
FRANK E. VOGEL,
EDWARD F. SWIFT,
LOUIS F. SWIFT,
NELSON MORRIS,
PHILIP D. ARMOUR.

Signed in presence of

EDWARD J. MARTYN,
205 La Salle St.,
Chicago, Ill.

Respectfully submitted,

EDGAR B. KIXMILLER,
ROSS DEAN RYNDER,

Counsel for Appellants.

January 21, 1942.

